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"Δεῖ καὶ τὰς ἄλλας ἐπισκέψασθαι πολιτείας . . . ἵνα τό τ'ὀοθῶς ἔχον ὀφθῃ καὶ τὸ χρήσιμον."—Arist. *Pol* II. 1

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IRELAND'S MONEY CLAIM AGAINST GREAT BRITAIN.

[*Contributed by* THE RIGHT HON. LORD JUSTICE O'CONNOR.]

THE Treaty between Great Britain and Ireland, dated December 5, 1921, provides as follows :

Clause 5 : The Irish Free State shall assume liability for the service of the public debt of the United Kingdom as existing at the date hereof, and towards the payment of war pensions as existing at that date, in such proportion as may be fair and equitable, having regard to any just claims on the part of Ireland by way of set-off or counter-claim, the amount of such sums being determined, in default of agreement, by the arbitration of one or more independent persons, being citizens of the British Empire.[1]

The claim of Ireland by way of set-off or counter-claim can be presented under two heads : (1) under the Act of Union, and (2) under the dissolution of partnership which was effected by the Treaty itself.

For the purpose of the inquiry, it must be taken that the Act of Union was an agreement freely entered into by two competent contracting parties. It is, of course, beyond question that the passing of the Act of Union was secured by a lavish distribution of honours and even of monetary bribes [2] ; but anybody who takes the trouble to go into the matter will find evidence to show that a great body of Irish Catholic opinion was in favour of the measure.[3]

[1] The Treaty also onerates the Irish Free State with payment of compensation to retiring officials ; it does not provide for payment of any Imperial contribution ; Ireland will have British protection free ; in this respect Ireland is, of course, in the same position as the other Dominions, whose contributions to Imperial defence are entirely matters for themselves.

[2] The Protestant landlord class, however, who constituted the Irish Parliament, gave up much when they committed political suicide ; the " representatives " were representatives in name only, being almost all the nominees of the owners of the pocket boroughs ; and a pocket borough in these days was a most valuable commodity ; the patronage was not infrequently the subject-matter of a marriage settlement.

[3] Most, if not all, of the Catholic Bishops declared in favour of the Act of Union —no doubt in the belief that thereby the Catholics stood a better chance of having their disabilities removed. As Wyse puts it in his *History of the Catholic Association*, the Catholics were bribed by promises, the Protestants by realities.

At any rate, it is futile to go into the question whether the Act of Union did or did not represent the opinion of the majority of the Irish people; an investigation of the subject, at this distance of time, could produce no certain result.

And, indeed, if the Act of Union were out of the way altogether, or if, whether in the way or not, it were competent to go back to a period anterior to it, similar considerations would preclude the tribunal from investigating the whole course of Anglo-Irish relations from the time of the Anglo-Norman landing down to 1921. The inquiry would be interminable, and would lead nowhere.

Consequently, the Irish claim has hitherto, quite logically, been based upon the Act of Union. To this claim will now—also quite logically—be added another, namely, the claim arising under the dissolution of partnership. I shall deal with these in order.

The question whether Ireland has a "just claim by way of set-off or counter-claim" under the Act of Union is another way of asking, "Was there a breach by the Parliament of the United Kingdom of the Act of Union?" The question is not whether the bargain was a good one for Ireland or not. Without expressing any opinion of my own, I shall try to explain upon what grounds the charge of a breach rests, and what I conceive may be the British answer to it.

The feeling in Ireland is all but universal that Ireland has been swindled out of its just rights under the Act of Union. Speaking at Springfield, Mass., in January 1923, Mr. J. J. O'Kelly, a well-known Irish propagandist,[1] spoke of "an acknowledged debt of 2,500,000 dollars due by Britain to Ireland" (*Irish World*, January 20, 1923). There is, of course, no "acknowledged" debt; but this sort of teaching, accepted by the ordinary Irish citizen without investigation, has wrought incalculable mischief; nothing, in recent years, has done so much to embitter Anglo-Irish relations. It is a great pity, for a little sober consideration of the terms of the Act of Union will convince even the greatest partisan that the question is, at least, a very arguable one, and many minds will come to the conclusion that there is no debt at all—no breach of the agreement.

The Act of Union was in the nature of a partnership agreement between the two countries. It must be construed like an agreement between individuals—that is to say, according to its intent as conveyed by its language; if there is any ambiguity in its terms, we must try and solve it as best we may. And we must not surrender

[1] This gentleman is a Republican, but the sentiment he expresses is by no means confined to Republicans, but is shared by all sections.

our judgment upon the matter to this person or that person; any educated man who applies his mind to the problem can form his own conclusion upon it; it is not a question exclusively for a financial expert or a lawyer or a member of a Financial Relations Commission or a politician. The agreement is there to look at and construe. As I shall presently show, the controversy turns mainly, if not entirely, on the construction of the instrument.

Before quoting the agreement, a preliminary observation will enable us to understand the reason for one of its provisions. Pitt desired and designed a complete union between the two islands. But there was, in 1800, an insurmountable obstacle in the way. At that time Ireland had, in proportion to its estimated resources, a small National debt; Great Britain had, in proportion to its estimated resources, a big National Debt [1]; consequently, to have amalgamated the Exchequers and to have merged the two debts and to have imposed indiscriminate taxation on the fiscal entity thus formed would have been a gross and manifest injustice to Ireland. Some other plan had to be devised, even though the result should be, temporarily at any rate, a very partial and incomplete union.

Such plan is to be found in Article 7 of the Act of Union. So far as is material, it is this:

The United Parliament was to impose the taxation upon Ireland as upon Great Britain, but the taxation was not to be indiscriminate. The taxation from Ireland was to be sufficient to meet (1) Ireland's local services; (2) the charges for interest and sinking fund in respect of Ireland's National Debt; and (3) an Imperial contribution bearing a ratio to Great Britain's Imperial contribution of 2 to 15—that being the then ratio of the supposed relative wealth of the two islands; this ratio was to be revised every twenty years. So far, no question arises; this part of the legislative bargain was, admittedly, kept; Ireland has no claim on this score.

But the Act of Union went on to provide for a complete fiscal union in certain events, one of which happened. If both National Debts were paid off (which was the anticipated event, but which did not happen) or if the ratio which the Irish National Debt bore to the English National Debt was the same as the ratio which the

[1] The figures: Ireland's National Debt £28,000,000, Great Britain's National Debt £446,000,000, the proportion being 1 to 17. On the other hand, Ireland's wealth as compared with that of England was supposed to be in the ratio of 2 to 15—it was calculated on a comparison of exports and imports and of articles consumed.

Irish Imperial contribution bore to the British Imperial contribution (which did happen) the Exchequers were to be amalgamated, and certain consequential provisions were to take effect. It is upon these consequential provisions that the controversy turns.

Now we come to the agreement, which it is better to quote in full, dividing it, for convenience, into numbered sections—it is not so divided in the statute—and underlining the important portions :

(1) That it be the seventh Article of the Union that the charge arising from the payment of the interest, and the sinking fund for the reduction of the principal of the debt incurred in either Kingdom before the Union, shall continue to be separately defrayed by Great Britain and Ireland respectively, except as hereinafter provided :

(2) That, for the space of twenty years after the Union shall take place, the contribution of Great Britain and Ireland respectively towards the expenditure of the United Kingdom in each year shall be defrayed in the proportion of fifteen parts for Great Britain and two parts for Ireland ; and that at the expiration of the said twenty years the future expenditure of the United Kingdom (other than the interest and charges of the debt to which either country shall be separately liable) shall be defrayed in such proportions as the Parliament of the United Kingdom shall deem just and reasonable, upon a comparison of the real value of the exports and imports of the respective countries, upon an average of the three years next preceding the period of revision ; or on a comparison of the value of the quantities of the following articles consumed within the respective countries, on a similar average, *videlicit*, beer, spirits, sugar, wine, tea, tobacco and malt ; or according to the aggregate proportion resulting from both these considerations combined ; or on a comparison of the amount of income in each country, estimated from the produce for the same period of a general tax, if such shall have been imposed on the same description of income in both countries :

(3) And that the Parliament of the United Kingdom shall afterwards proceed in like manner to revise and fix the said proportions, according to the same rules or any of them, at periods not more distant than twenty years nor less than seven years from each other ; unless previous to any such period the Parliament of the United Kingdom shall have declared, as hereinafter provided, that the expenditure of the United Kingdom shall be defrayed, indiscriminately, by equal taxes imposed on the like articles in both countries :

(4) That, for the defraying the said expenditure according to the rules above laid down, the revenues of Ireland shall hereafter constitute a Consolidated Fund, which shall be charged, in the first instance, with the interest of the debt of Ireland, and with the sinking fund applicable to the reduction of the said debt, and the remainder shall be applied

towards defraying the proportion of the expenditure of the United Kingdom to which Ireland may be liable in each year:

(5) That the proportion of contribution to which Great Britain and Ireland will be liable shall be raised by such taxes in each country respectively, as the Parliament of the United Kingdom shall from time to time deem fit: Provided always, that in regulating the taxes in each country by which their respective proportions shall be levied, no article in Ireland shall be made liable to any new or additional duty by which the whole amount of duty payable thereon would exceed the amount which will be thereafter payable in England on the like article:

(6) That if, at the end of any year, any surplus shall accrue from the revenues of Ireland, after defraying the interest, sinking fund, and proportional contributions and separate charges to which the said country shall then be liable, taxes shall be taken off to the amount of such surplus, or the surplus shall be applied by the Parliament of the United Kingdom to local purposes in Ireland, or to make good any deficiency which may arise in the revenues of Ireland in time of peace, or be invested by the Commissioners of the National Debt of Ireland in the Funds to accumulate for the benefit of Ireland at compound interest, in case of the contribution of Ireland in time of war; provided that the surplus so to accumulate shall at no future period be suffered to exceed the sum of £5,000,000:

(7) That all moneys to be raised after the Union, by loan, in peace or war, for the service of the United Kingdom by the Parliament thereof, shall be considered to be a joint debt, and the charges thereof shall be borne by the respective countries in the proportion of their respective contributions; provided that if at any time, in raising their respective contributions hereby fixed for each country, the Parliament of the United Kingdom shall judge it fit to raise a greater proportion of such respective contributions in one country within the year than in the other, or to set apart a greater proportion of sinking fund for the liquidation of the whole or any part of the loan raised on account of the one country than of that raised on account of the other country, then such part of the said loan, for the liquidation of which different provisions shall have been made for the respective countries, shall be kept distinct, and shall be borne by each separately, and only that part of the said loan be deemed joint and common, for the reduction of which the respective countries shall have made provision in the proportion of their respective contributions:

(8) That if at any future day the separate debt of each country respectively shall have been liquidated, or if the values of their respective debts (estimated according to the amount of the interest and annuities attending the same, and of the sinking fund applicable to the reduction thereof, and to the period within which the whole capital of such debt shall appear to be redeemable by such sinking fund) shall be to each other in the same proportion with the respective contributions of each country respectively; or if the amount by which the value of the larger of such

debts shall vary from such proportion shall not exceed one-hundredth part of the said value:

And if it shall appear to the Parliament of the United Kingdom that the respective circumstances of the two countries will thenceforth admit of their contributing indiscriminately, by equal taxes imposed on the same articles in each, to the future expenditure of the United Kingdom, it shall be competent to the Parliament of the United Kingdom to declare that all future expense thenceforth to be incurred, together with the interest and charges of all joint debts contracted previous to such declaration, shall be so defrayed indiscriminately by equal taxes imposed on the same articles in each country, and thenceforth from time to time, as circumstances may require, to impose and apply such taxes accordingly, subject only to such particular exemptions or abatements in Ireland, and in that part of Great Britain called Scotland, as circumstances may appear from time to time to demand: That, from the period of such declaration, it shall no longer be necessary to regulate the contribution of the two countries towards the future expenditure of the United Kingdom according to any specific proportion, or according to any of the rules hereinbefore prescribed:

(9) Provided nevertheless, that the interest or charges which may remain on account of any part of the separate debt with which either country shall be chargeable, and which shall not be liquidated or consolidated proportionately as above, shall, until extinguished, continue to be defrayed by separate taxes in each country; that a sum not less than the sum which has been granted by the Parliament in Ireland on the average of six years immediately preceding the first day of January in the year 1800, in premiums for the internal encouragement of agriculture or manufactures, or for the maintaining institutions for pious and charitable purposes, shall be applied for the period of twenty years after the Union, to such local purposes in Ireland in such manner as the Parliament of the United Kingdom shall direct: That from and after the first day of January 1801, all public revenue arising to the United Kingdom from the territorial dependencies thereof, and applied to the general expenditure of the United Kingdom, shall be so applied in the proportions of the respective contributions of the two countries.

In 1816, the second of the two contingencies mentioned in clause (8) *supra* of the agreement came to pass; and the United Parliament accordingly passed a resolution in the terms of the agreement.

From 1817 to 1921 Great Britain and Ireland had a common purse which was filled by taxation imposed at Westminster on the fiscal entity called the United Kingdom, and out of which were

paid the cost of Imperial and local services. This taxation was never quite indiscriminate, but it tended to become so. From time to time taxes were imposed upon Great Britain but not upon Ireland. Thus, for example, from 1817 to 1921, the sum of £101,000,000 was raised from Great Britain from customs, excise, stamps and taxes not raisable from Ireland; the income-tax [1] was not applied to Ireland till 1853; and so on. These exemptions and abatements have grown less and less; the Primrose Committee (1912) enumerated the following as not then applicable to Ireland—Land Tax, Inhabited Houses Duty, Railway Passenger Duty, and Patent Medicine Duties.

Now, the contention of Ireland is that, even after the amalgamation of the Exchequers, Ireland was, in no circumstances, to be taxed so as to produce a yield which would bear a greater ratio to the yield from Great Britain than the ratio which the taxable capacity of Ireland would bear to the taxable capacity of Great Britain.

The British answer to this is that the contention is wholly untenable, for it amounts really to saying that after the amalgamation the taxation was not to be indiscriminate at all, but was to be discriminate; to be varied from time to time according as Ireland's relative taxable capacity rose or fell; that this construction is opposed to the plain language of the agreement itself, which laid down indiscriminate taxation as the groundwork of the whole scheme, subject to a provision as to abatements and exemptions—a subject-matter for which can be easily suggested; that the pre-amalgamation period contains a most specific provision for the periodic ascertainment of Ireland's taxable capacity so as to revise the amount of the Imperial contribution; nothing similar is provided for the post-amalgamation period; indeed, the machinery for ascertaining relative taxable capacity is expressly scrapped; this is most significant, as tending to show that after the post-amalgamation period no ascertainment, periodic or otherwise, of the relative taxable capacities was intended.

The words "subject only to such particular exemptions or abatements in Ireland, and in that part of Great Britain called Scotland, as circumstances may appear from time to time to demand" create, according to the British contention, no difficulty. While in language as clear as can be the fundamental principle of indiscriminate taxation is laid down, it is deemed right that Parliament

[1] First imposed in Great Britain in 1793, repealed in 1816, reimposed in 1842.

should have, at its own discretion, the power to treat Ireland in a benevolent spirit and to give her such exemptions and abatements as it thought fit. This is, to be sure, slightly inconsistent with indiscriminate taxation, but fits in well enough with the main principle thereof; the measure of the discrimination was, obviously, anticipated to be small (" particular " exemptions and abatements) and was to be entirely within the discretion of the United Parliament. The provision applies to Scotland, and nobody has ever suggested that Scotland should be taxed according to its relative taxable capacity and not otherwise.

The British advocate goes on to say there is no injustice to Ireland in this construction; no inherent injustice at least; it may be that, contrary to anticipation, the bargain turned out badly for Ireland; but that has nothing to say to the construction of the bargain itself. There were obvious advantages in such a bargain Ireland's defence was no longer her own particular concern; free trade and a common fiscal policy were secured; Ireland was entitled to a representation of about one-sixth in the House of Commons. Her quota was based upon the relative resources (as 2 is to 15) of the countries, giving her something over; other advantages may have been in contemplation. If, in exchange for these things, Ireland took her chance with England as to the amount and incidence of taxation to be imposed by a United Parliament over the newly created fiscal entity, it was a bargain into which a prudent nation might very well enter; nobody could have foreseen that the war with France would have been so protracted and that Ireland's contribution to Imperial services would in the result have brought that country to the verge of bankruptcy.

Here are the constructions:

(a) *The Statute*

It shall be competent for the United Kingdom Parliament to declare that all charges " shall be so defrayed indiscriminately by equal taxes imposed on the same articles in each country, and thenceforth from time to time as circumstances may require to impose and apply such taxes accordingly, subject only to such particular exemptions or abatements in Ireland, and in that part of Great Britain called Scotland, as circumstances may appear from time to time to demand. That from the period of such declaration it shall no longer be necessary to regulate the contributions of the two countries towards the future expenditure of the United Kingdom according to any specific proportion, or according to any of the rules hereinbefore prescribed."

(b) *Construction No.* 1

(*British Construction*)

There shall be one fiscal entity, to wit, the United Kingdom.

The expenses thereof, whether local or Imperial, shall be defrayed by indiscriminate taxation over the entire entity.

In consideration of Ireland's and Scotland's backwardness and poverty Parliament shall have power to give these countries exemptions and abatements. Such exemptions and abatements are within the discretion of Parliament, and, in measuring them, Parliament shall have regard to all the circumstances of the case, including the cost of running Ireland (or Scotland).

(c) *Construction No.* 2

(*Irish Construction*)

There shall be one fiscal entity so far as paying out the expenses, local and Imperial, of the entity are concerned.

There shall be two (*quære*, three) fiscal entities so far as raising the sum to meet expenses is concerned.

The taxation of these two (*quære*, three) entities shall not be indiscriminate ; on the contrary, Ireland (*quære*, Scotland) shall not be taxed to more than its relative taxable capacity to Great Britain (*quære*, England and Wales).

Parliament shall not consider all the circumstances ; Parliament shall not consider the cost of running Ireland (*quære*, Scotland).

Then the British contention proceeds thus :

Before amalgamation, Ireland was not alone to pay its way, but to pay something over as well in the shape of an Imperial contribution.

If the contention put forward on behalf of Ireland be accepted, then, after amalgamation, Ireland would or might have a lesser rate of taxation than that prevailing in Great Britain, even though, at the same time, the yield from Ireland should be insufficient to meet the running expenses of that country.

Take, for example, the year 1893–4. In that year Ireland's taxation yielded £7,568,000 ; her outgoings for Irish local services were £5,602,000, leaving £1,966,000 for Imperial contribution. Great Britain's taxation yielded £89,286,000, her expenditure for British local services £30,618,000, leaving £58,668,000. But if construction No. 2 be applied, Ireland's taxation should be reduced to £4,640,000, being one-twentieth of Great Britain's yield. (The Financial Relations Commission found that 1 to 20 was Ireland's taxable capacity.) In other words, not alone would Ireland not pay

anything towards Imperial contribution, but she would receive a subsidy from Great Britain to run the Irish establishment. Results still more startling would follow if later years were taken, when, even on the indiscriminate taxation basis, the yield from Ireland did not pay the expenses of Irish local services.[1]

The reference to the Financial Relations Commission [2] is in the following terms:

To inquire into the financial relations between Great Britain and Ireland, and their relative taxable capacity, and to report:

1. Upon what principles of comparison, and by the application of what specific standards, the relative capacity of Great Britain and Ireland to bear taxation may be most equitably determined.

2. What, so far as can be ascertained, is the true proportion, under the principles and specific standards so determined, between the taxable capacity of Great Britain and Ireland.

3. The history of the financial relations between Great Britain and Ireland at and after the Legislative Union, the charge for Irish purposes on the Imperial Exchequer during that period, and the amount of Irish taxation remaining available for contribution to Imperial expenditure, also the Imperial expenditure to which it is considered equitable that Ireland should contribute."

The Commission, with practical unanimity, found as follows:

I. That Great Britain and Ireland must, for the purpose of this Inquiry, be considered as separate entities.

II. That the Act of Union imposed upon Ireland a burden which, as events showed, she was unable to bear.

III. That the increase of taxation laid upon Ireland between 1853 and 1860 was not justified by the then existing circumstances.

IV. That identity of rates of taxation does not necessarily involve equality of burden.

V. That whilst the actual tax revenue of Ireland is about one-eleventh of that of Great Britain, the relative taxable capacity of Ireland is very much smaller, and is not estimated by any of us as exceeding one-twentieth.

[1] This was the state of facts from 1909 to 1914: Ireland was run at a loss; the war taxation created a balance the other way.

[2] Consisting of The O'Conor Don (Chairman), Mr. Hugh Childers (who died before the issue of the final report, but who left a valuable draft report which is, in substance, adopted by the majority), Lord Farrer, Lord Welby, Sir Robert Hamilton (who also died), Sir Thomas Sutherland, Sir David Barbour, Mr. B. W. Currie, Mr. W. A. Hunter, Mr. C. E. Martin, Mr. J. E. Redmond, Mr. Thomas Sexton, Mr. H. F. Slattery and Mr. Wolff.

It will be noted that the reference to the Commission does not ask for a finding whether there was a breach of the Act of Union. Nor do the findings *supra* include any finding that there was such a breach.

But there were several separate reports, in some of which two opinions are unmistakably impressed :

(1) That there had been a formal breach of the Act of Union, because Ireland had been taxed beyond its relative taxable capacity, and this was contrary to the statute.

(2) That there had been a breach, in spirit if not in form, because the United Parliament had not sufficiently taken into account the special circumstances of Ireland when determining the question of what " exemptions and abatements " that country should receive ; and the opinion was expressed that for the purpose of this consideration the United Parliament was not at liberty to consider whether or not the yield from Ireland was sufficient to pay Ireland's running expenses.

As to the first of these opinions, I have already summarized the arguments against it derived from the construction of the statute.

But some of the members of the Commission, in support of their view, rely on contemporary statements made by the statesmen responsible for the measure. To construe a statute by reference to matters of this kind is obviously so dangerous that our courts of law will not tolerate it. But, assuming this point to be waived, let us see what the statements are.

The Report of The O'Conor Don (Chairman), Mr. J. E. Redmond, Mr. C. E. Martin, Mr. W. A. Hunter and Mr. G. W. Wolff states (pp. 4 and 5, par. 10) :

> Mr. Pitt, in announcing the project of the Legislative Union in 1799, stated that one of the objects which he looked forward to, and which he hoped might be found practicable, was, " to secure that Ireland should never be taxed but in proportion as we tax ourselves." Lord Castlereagh said : " As to the future, it is expected that the two countries should move forward together, and unite with regard to their expenses in the measure of their relative abilities. Were our entire expenditure common, which would happen if neither Kingdom had any separate debts, or if their debts were in proportion to their ability, by no system whatever could they be made to contribute so strictly according to their means as being subject to the same taxes equally bearing on the great objects of taxation in both countries," and as this would not be fair on account of the disparity of the separate debts, he went on to say, " The great point, therefore, to be ascertained is the best criterion which can be formed of the

relative means of the two countries, in order to fix the relative proportions of their contributions." Having stated the principle of the financial arrangements which he proposed, he explained that Parliament was to have the power to revise the proportionate contributions of 15 to 2, at the end of twenty years, in case they might " under different circumstances prove to be both partial and advantageous." By there being a provision for revision, Ireland has the utmost possible security that she cannot be taxed beyond the measure of her comparative ability, and that the ratio of her contributions must ever correspond with her relative wealth and prosperity.

To all of which the British reply is: Pitt's statement is, to say the least of it, ambiguous. Castlereagh's statement is emphatically in favour of the British construction. In effect he says: " If the debts were relatively equal, the question would solve itself, for indiscriminate taxation would be perfectly fair "; but then, going on to speak of the condition of things which obtained till 1816, he says in effect: " As our relative debts are not equal for the present, we seek a temporary expedient, and we propose to fix the Imperial contribution by reference to taxable capacity, to be determined by periodic revision." The Chairman and those other four members go on to say:

From these and other statements made at the passing of the Act of Union, it appears to us to be clear that even when indiscriminate taxation was looked forward to, it was justified and contemplated upon the express ground that it would be of such a character as to correspond to the relative taxable capacities of the two countries.

The British case is that if for this are substituted the words, " when indiscriminate taxation was looked forward to, it was justified as being fair to both countries " the statement would be correct; both countries agreed to indiscriminate taxation as being a fair and just method of burdening the various components of the fiscal unit.

Messrs. Sexton, Blake and Slattery, however, at page 104 boldly say that—

Taxation of Ireland in excess of the measure defined by her relative resources violates the covenant which extinguished the Parliament of Ireland, and offends against the solemn obligation on the faith of which the Imperial Parliament secured the sole power, and accepted the duty, of administering Irish affairs.

The second of the two opinions mentioned *supra*—that is, that there was a breach in spirit, if not in form—is to the effect that, in considering the question of exemptions and abatements, Parliament should have no regard to the question whether Ireland's yield was equal to Ireland's expenses.

As to this, Mr. Childers was obviously right when he said (p. 150, par. 52) :

> We consider this provision in the Act of Union to be of great and essential importance to the present inquiry, showing, as it does, that the claim of Ireland to special consideration in fiscal matters as a distinct section of the United Kingdom has never been suffered to become extinct, and that it is therefore, even from a legal point of view, impossible to consider Ireland as being, fiscally, no more than a certain group of counties of the United Kingdom. This fact seems to be the foundation of the reference made to the Commission.

This, however, does not touch the point under consideration, namely, upon the basis of what considerations the Parliament should rest its conclusion. As to this, the Report by the Chairman and four others says (p. 22, par. 99) :

> The division of Imperial expenditure into three parts, one for local purposes in Great Britain, one for local purposes in Ireland and one for Imperial purposes, is, we must remark, a distinction of quite modern creation. It was not thought of at the time of the Act of Union. It is quite clear according to the provisions of that Act that the Imperial expenditure to which Ireland was to contribute in proportion to her resources included all civil Government expenditure, no matter in what part of the United Kingdom it took place. Nothing could be clearer than Mr. Pitt's and Lord Castlereagh's declaration on this point, and it is not denied by Sir E. Hamilton that, if the provisions of the Act of Union were still in force, Imperial expenditure should be treated as a whole and could not be split up in the way in which he suggests.

Britain replies : It is difficult to follow the statement that " the division of Imperial expenditure into three parts, one for local purposes in Great Britain, one for local purposes in Ireland, and one for Imperial purposes is, we must remark, a distinction of quite modern creation. It was not thought of at the time of the Act of Union." Surely the contrary is the fact ; it was, most unquestionably, thought of at the time of the Act of Union, and provided for. Because, under the Act of Union, in the pre-amalgamation period,

Ireland's taxation had to yield the sum of three component parts which had to be ascertained :

(1) Cost of local services.

(2) Interest and sinking fund on Irish National Debt.

(3) Imperial contribution.

It is quite true that in the post-amalgamation period no such sum in addition was necessary—owing to the merging of all these sources of expense in the United Kingdom expenses—but this is far from saying that in considering exemptions and abatements the United Kingdom Parliament should not consider whether the granting of exemptions and abatements would not be in effect a subsidy towards defraying Ireland's running cost.

Britain further says : But what does the statute say upon this ? The exemptions and abatements are to be such " as circumstances may appear from time to time to demand." Is not the cost of running Ireland—and Scotland—a circumstance ? If not, why not ?

The Commission were of opinion that the cost of Irish administration—even if it were competent to take such cost into account—was extravagant. Assuming that to be so, it constitutes no breach of the statute. The administration was constructed by the machinery agreed to—namely, machinery provided by the United Parliament.

The findings of the Financial Relations Commission on purely financial questions are, obviously, entitled to great weight.

" Taxable capacity " they ascertained in a variety of ways—by reference to yield from income-tax, estate duty, and so forth. Some of their number laid it down that taxation should fall on the surplus left to the individual after the cost of subsistence had been deducted (Report of Messrs. Sexton, Blake and Slattery, page 61, par. 5). But, popularly stated, the findings of the Commission were : the taxation of a country is the taxation of the individuals in the country ; taxation hits a poor man more heavily than a rich, for it takes a relatively greater share of his income, whether that income be gross income, or net income, after deducting the subsistence allowance ; as Ireland has a much greater population of poor men than Great Britain, Ireland is hit harder by taxation, which, on the face of it, is imposed equally upon all ; furthermore, taxes on spirits and tea, greatly consumed in Ireland, are very high. One may safely assume the correctness of these conclusions ; indirect taxation does seem to hit the poor man harder than the rich.

It should not, however, be assumed from this that—if the relative

debts had been equal at the time of the Union—a complete amalgamation of the two countries on a purely indiscriminate taxation basis would have been necessarily disadvantageous to Ireland. To determine this, a comparison would have to be made between two figures: (1) the yield from Ireland on the indiscriminate taxation basis, and (2) the yield required to defray (*a*) the cost of running the country, *plus* (*b*) interest and sinking fund on Ireland's National Debt, *plus* (*c*) the expense of a separate Irish military establishment.

Curiously enough, Cavour thought that, from the financial point of view, O'Connell was making a mistake in pressing for a repeal of the Union. He takes[1] the figures for 1834 and ascertains the following distribution of the produce of the imposts in the two Kingdoms:

	Great Britain.	*Ireland.*
Customs	£19,353,324	£1,757,143
Excise	13,061,852	1,966,183
Post	1,970,361	240,471
Stamps	6,825,679	466,170
Taxes	4,662,256	—
	£45,873,472	£4,429,967

Reckoning Ireland's wealth as about one-eleventh of that of England, he goes on to speculate how a repeal of the Union would then operate upon Ireland financially.

He puts Britain's debt in 1836	£787,683,816
He charges to Britain exclusively her debt of £239,350,148 which she owed in 1783	239,350,148
	£548,333,668
Of this sum, he says, Ireland's share should be, say	60,000,000
which would mean for interest alone	2,000,000
Ireland's revenue was	5,000,000
which would leave to Ireland for Ireland's local services, including defence	£3,000,000

and he goes on to say:

A very scanty revenue for a country of eight millions of inhabitants. All the States of Europe spend in proportion to their population twice, thrice, even six times more than this. It would be wholly insufficient to enable Ireland to dispose of any military force, and to maintain the police and the magistracy on the footing on which they are at present constituted. One of the first consequences of repeal, accordingly, would be to force upon the Parliament of Dublin an increased taxation.

[1] *Cavour on Ireland*, p. 68.

He then remarks that a change in the distribution of the taxes would not help. Customs are nearly one-half of the resources of the State, being duties on Colonial products, sugar and tea in particular. To reduce these would relieve the middle classes; but six-sevenths of the population would find not the least benefit, for these articles do not at all enter into their consumption; that, with the customs, the excise forms almost the whole of the public revenue of Ireland, and that nobody thinks of reducing taxes on spirits.

Cavour was budgeting for a population of eight millions; his figure of £60,000,000 would not be considered by any Irishman as just to Ireland, having regard to the state of Ireland's National Debt in 1800. But the principle of his comparison is correct, and his conclusion, even making necessary adjustments in Ireland's favour, is worthy of consideration.

Where the bargain effected in 1800 really proved unjust to Ireland was in the ascertainment of Ireland's Imperial contribution at 2/17. As already stated, this was in the ratio of the supposed relative resources or taxable capacities of the two islands, and was arrived at by a comparison of trade (exports and imports) and of consumption. The ratio, as provided by the statute, was revisable every twenty years. But, before two decades had passed, the burden made Ireland bankrupt; Ireland's National Debt had swollen from £20,000,000 in 1800 to £112,000,000 in 1816. The bargain was obviously a bad bargain, and it was so because relative taxable capacity cannot well be ascertained by reference solely to trade and consumption. The peasant population of Ireland were unable to foot their portion of the bill for the long war; the yield from Irish taxation in 1816 was only £5,560,000; the outgoings £11,200,000.[1] But, as already pointed out, no breach of the bargain can be suggested; indeed, Miss Murray, a writer certainly not unfriendly to Ireland, says of this period: "The financial arrangements which had been made by the Treaty of Union seem to have been carried out in a way that was as little oppressive as possible to Ireland, and we have Lord Plunket's testimony to the justice and impartiality with which Irish interests were safeguarded by the Imperial Parliament."[2]

On the other hand, it is possible that if Pitt, in estimating the relative resources and taxable capacities of the two countries,

[1] *Financial Relations Commission Report*, App. I, Tables II and IV, pp. 334–5.
[2] *Commercial Relations between England and Ireland*, p. 375.

had pursued the lines of thought of the Financial Relations Commission, he would have ascertained Ireland's ratio as 1 to 17 or less, and, as such a ratio would have been the same as the ratio between the respective National Debts, he would then have been able to secure an immediate fiscal union.

If, therefore, the true ratio of the relative taxable capacities in 1800 was 1 to 17 or under, no hardship befell Ireland from 1800–17—unless the principle of indiscriminate taxation be itself a hardship—because this principle should have operated from 1800 instead of from 1817.[1]

Whatever opinion may be formed as to the charge of a breach of the Act of Union, Ireland's claim under another head to a set-off or counter-claim against the National Debt seems incontrovertible. This claim rests upon a doctrine of the law of partnership. On the dissolution of a partnership, if the assets exceed the liabilities, they are divided either in accordance with the terms of the partnership agreement, or, if no such terms are prescribed, in the proportion of the capital brought in by each partner. On the other hand, if the liabilities exceed the assets, each partner must pay his share of the *net* liabilities in the proportion agreed, or, if none is prescribed, in the proportion of his interest in the concern.

The British National Debt is £7,500,000,000, more or less. But this is gross debt. Before Ireland's share thereof can be arrived at, it will be necessary to come to a conclusion as to what the net debt is. Accordingly, from the £7,500,000,000 must be deducted all sums that will be recoverable from England's debtors—colonies, allies, ex-enemies ; the value, at the date of the dissolution, of all the assets, such as warships, aeroplanes, guns, equipment and stores. I scarcely think that this principle will be challenged by anybody.

The investigation, in the nature of things, cannot take place for some time. Thus, it cannot precede the findings of the Boundary Commission set up under the Treaty to settle the much-vexed boundary question between the Irish Free State and Northern Ireland. For no arbitrator could applot the burden unless he knew the extent of the territory which would have to bear it. The question of how much will be recovered from England's debtors will also require time for its elucidation.

[1] From 1800–17 the taxation was less in Ireland than in England; Ireland had no income-tax, Great Britain a 2*s.* income-tax. It must also be borne in mind that Ireland did not meet its own National Debt, which was merged in the United Kingdom debt.

When all is said and done, a solution of the question will probably be arrived at by reference to political expediency rather than to strict right. If a compromise could be come to, so much the better.

The relations between the two islands have, up to recently, been most unhappy. There have been faults, many and grievous, upon both sides—arising, as I believe, from ignorance and misunderstanding rather than from malevolence. Every lover of peace, of justice, of either country will wish to see the dark chapter closed. The nations are separating, in one sense; each is going its own way; in another sense—that is, in the free and frank acknowledgment of community of interests—let us hope that they will be brought together more closely than ever before. For this, they must part in goodwill; a friendly adjustment of their money relations—this time, at any rate, the achievement of free and competent parties—is, above all things, to be desired.

The Free State Government have observed the Treaty in the spirit as well as in the letter. They have put down a formidable Republican conspiracy with a courage which it is no exaggeration to call superb, and with a severity which no British Government would have ventured upon. There are still formidable obstacles in the way. Not the least of these is the disillusionment which follows every revolution but which in Ireland will be more than usually acute, having regard to the belief, so universal amongst all classes, that social evils can be waved away by a magic wand in the hands of an Irish Government. It would be a lamentable thing to add to these difficulties by imposing upon Ireland a burden which it could not discharge, or which would create a sense of grievance; the blunder of the Union would be thereby repeated with, in process of time, the same disastrous results.

At the same time, if I were an Englishman, I should insist, before arriving at any compromise, upon a finding by the tribunal whether or not there had been a breach of the Act of Union. If a breach be established, England should admit its fault, and make restitution. If it be held that no breach was committed England will stand relieved from a grave imputation upon its honour.

THE LEGISLATIVE COUNCIL OF NEW ZEALAND.

[*Contributed by* JAMES CHRISTIE, ESQ., LL.M., *Parliamentary Law Draftsman.*]

Historical Review of Constitution.—The authority for the constitution of the Legislative Council of New Zealand is to be found in section 33 of the Imperial Act known in New Zealand as "the Constitution Act" (*i.e.* 15 and 16 Victoria, c. 72). That section empowered Her Majesty, for the purpose of constituting a Legislative Council of New Zealand, by instrument under her Royal Sign Manual, to authorize the Governor in Her Majesty's name, "to summon to the said Legislative Council such persons, being not less in number than ten, as Her Majesty shall think fit." By the next succeeding section it was enacted that, subject to certain disqualifying provisions, every member of the Legislative Council of New Zealand should hold his seat therein for the term of his life. The Speaker of the Legislative Council so constituted was appointed by the Governor, and the quorum for meetings was fixed at five members, including the Speaker. The foregoing provisions continued in force until September 17, 1891, on which date the New Zealand Legislature passed the Legislative Council Act, 1891. In the meantime the Imperial Parliament had passed the Act 31 and 32 Victoria c. 57, to remove doubts as to the validity of certain appointments and to make provision for future appointments. The point at issue was the validity of the appointment of persons who, previously to their being summoned to the Legislative Council, had not been expressly named or appointed by Her Majesty in an instrument under the Royal Sign Manual or otherwise. The Act declared such persons to have been legally summoned and made provision for future appointments by the Governor in Her Majesty's name.

By the Legislative Council Act 1891 (New Zealand) the Governor was empowered to summon to the Legislative Council, in Her Majesty's name and by an instrument or instruments under the

Public Seal of New Zealand, such persons as he thought fit, and every person so summoned thereby became a member of the Council. Every person appointed under the Act of 1891 was appointed for a limited term of seven years, but was eligible for reappointment from time to time; then-existing appointments for life were not interfered with. By the same Act authority was conferred on the Council to elect its own Speaker.

The Act of 1891 was repealed (in the process of a general consolidation of the Statutes) in 1908, and was re-enacted as Division I of the Legislature Act, 1908. No material alteration of the law was made until 1914, when the Legislative Council Act, 1914, was passed. With the exception of section 23 (which related to the duration of appointments made after the passing of that Act and before its commencement) the commencement of the Act was postponed, and it has never been brought into operation. It provides for an elective Council of forty members, elections to be conducted on a system of proportional representation.[1] When, if at all, the Act will be brought into operation is a matter of policy. Section 23 (which came into operation on the passing of the Act) was afterwards repealed by the Legislative Council Amendment Act 1918, of which section 2 restored the provision that appointments to the Council should endure for seven years.

Number of Councillors.—The Constitution Act fixed a minimum of ten, but did not fix a maximum limit to the number of persons that may be appointed to the Legislative Council. As a matter of fact sixteen persons were originally summoned, of whom fourteen attended and were enrolled. The number increased irregularly for thirty years, and in 1885 was fifty-three. The usual number is about forty.

Payment of Legislative Councillors.—By the Civil List Act, 1920, the remuneration of members of the Legislative Council was fixed at £350 per annum. This was reduced to £315 per annum, by the operation of the Public Expenditure Adjustment Act, 1921–22. Prior to 1920 (and since 1904) the rate was £200 per annum.

Leader of the Council.—The Leader of the Council is, in practice, a member of the Executive Council and a responsible Minister of the Crown. Since 1912 the position has been held by the Hon. Sir Francis Bell, G.C.M.G., K.C., His Majesty's Attorney-General for the Dominion of New Zealand.

[1] See *Journal of Comparative Legislation*, New Series, vol. xvi, pt. 1, p. 135.

Functions of the Legislative Council.—The Council may initiate legislation or may amend measures which it receives from the House of Representatives. The only limitation is with respect to "money bills," in regard to which the Standing Orders of the House of Representatives declare as follows:

> All aids and supplies, and aids to His Majesty in Parliament, are the sole gift of the House of Representatives; and all Bills for the granting of any such aids and supplies are to begin with the House of Representatives; and it is the undoubted and sole right of the House of Representatives to direct, limit and appoint in such Bills the ends, purposes, considerations, conditions, limitations and qualifications of such grants; which may not be changed or altered by the Legislative Council.

In practice, Bills are frequently introduced in the Legislative Council by the Leader, for the purpose of saving time while the House of Representatives is engaged in financial or other lengthy debates. A Bill having passed the Council is ready for consideration by the House at its convenience. It also frequently happens, in the Council as at present constituted, that the Leader of the Council, who is a lawyer of distinction, introduces into the Council a Bill (difficult because of its legal or other technicalities), and, its contents having been explained to the Council, the explanation is available for the assistance of the House of Representatives when that body comes to deal with it.

Much of the important work of the Council is done through the agency of committees, more especially its "Statutes Revision Committee." Almost every Bill of importance (whether initiated in the Council or received by it from the House of Representatives) is referred to this Committee, of whose members the majority are retired legal practitioners. Very valuable work is consistently done by this Committee, whose recommendations are almost invariably accepted by the Council.

In the case of Bills that have originated in the Lower House advantage is frequently taken of the machinery afforded by the Legislative Council:

(*a*) To insert new provisions that may have been promised in the Lower House during the passage of the Bill through that House;

(*b*) To make amendments consequential on alterations made by the House of Representatives;

(*c*) To reconsider the form of amendments that may have been

made by the House of Representatives but which may be faulty in matter of draftsmanship or otherwise ;

(*d*) To add to the Bill any new matter the necessity or desirableness of which may not have appeared when the Bill was originally framed.

In all these matters (as also in the scrutiny of the form in which legislation is submitted), the Legislative Council, acting more particularly through its Statutes Revision Committee, renders useful service. The question remains, however, whether such service could not be equally well or even better performed by other means.

Any such question, however, is, as the law at present stands, a matter that can be effectively considered only by the Imperial Parliament. Section 32 of the Constitution Act (a section that the New Zealand Legislature has not authority to alter) provides as follows :

> There shall be, within the Colony of New Zealand, a General Assembly, to consist of the Governor, a Legislative Council, and House of Representatives.

On the second reading of the Legislative Council Reform Bill introduced into the Legislative Council in 1912 (the forerunner of the Legislative Council Act, 1914), the Hon. Mr. Bell (now Sir Francis Bell) in referring to the said section, said :

> We have no power, sir, to alter that section. This Chamber, unless the Imperial Legislature shall intervene, is a constituent part and must remain a constituent part, of the General Assembly of New Zealand.

On the question of privilege involved in any proposal to alter the constitution of the Council, the Leader of the Council in the course of the same debate, in answer to a question (which by the way was misunderstood) is reported to have said :

> I am asked a question—Why did I not try it in the House ? Because it is the privilege of this Council. If you reject it, it will be the last time. But once, at all events, the Council has the privilege to first consider a measure proposed for the reform of its own Constitution, and not to have such a reform sent up to it by dictation of the people. Reject it, and the people's will must be declared elsewhere. I answer the question gladly, because it answers many attacks that have been made upon the Government which I represent. Why do I present it here ? I present it here because it is your privilege and your right to

be the first to consider it. You will not deny that that process cannot be continued if the people's voice is to be heard. If you say that I should go to the House first you deny your own privilege. If on this occasion the Council will not accept reform then it is right and just and necessary that it should be ascertained whether the people, by their representatives, desire the reform.

The debate (the principal topic of which was the proposal to substitute an elective for an appointed Council) was concluded by these words :

And what reform is it that you, who have the honour and traditions of this Council in remembrance—and I think there is no man here who has not—are called upon to vote for ? Surely it is the advancement of the power and the prestige and the influence of this Council. What we propose is that the Council shall represent the whole of the people as it will if you elect it on the method proposed. Then members of the Council will sit " as men having authority and not as the Scribes." You will have at least equal—and as long as single electorates for the House continue you will have greater—authority in the popular mind of the country than the House. The reform of the constitution is for the dignity and for the advancement of the Chamber, as it is, I honestly believe, for the benefit of the country.

In moving the second reading the Bill of 1914 (now the Legislative Council Act, 1914), Sir Francis Bell distinguished between the functions of a nominated Council and an elective Senate, in their relation to the House of Representatives, in the following terms :

What I want to put before the Council and press upon Honourable Members, is that the functions of a Senate are properly larger than those which this Council under its present constitution is really enabled to exercise. It is common agreement that there should be excluded from the functions of a Senate matters of finance—that the House of Representatives should have the sole control of finance. That has been conceded in the more recent constitutions. Wherever a Senate is elected, still it is deprived of the power of interfering with finance, and the reason is that the control of finance gives the House, which goes more frequently to the electors, the power of determining who shall be the administration. That function is properly within the sole right of the House of Representatives, and is not a function of the Senate. But apart from these two limitations there is no reason why the Senate should not be a real force and power in the State, why it should not have, not merely the right, but the duty, of interposing when it considers that legislation is either hasty or opposed to what its members believe to be the desire of the electors. So long as the Council is nomi-

nated that cannot be its power, for so long as it is nominated it is in the power of the administration of the day to pass its measures over the head of any recalcitrant majority. The old limiting personal power of the Governor has practically disappeared by the extraordinary curtailment and limitation successively from Downing Street of the Governor's rights in such matters. So that now where the power of nomination exists it is exercised in all its practical essentials by the Ministry holding political power at the moment; and it is now, as the Council is at present constituted, in the power of any administration to pass its measures, whatever may be the present view of the majority of the Council. Concede that, but agree that if the Council be elective, that power passes away from the administration, the elected Council can exercise the power, as well as the right, to perform its duty, and it can perform the real and essential functions of a second Chamber freely. . . . From nominated Chambers all power is passing—in the House of Lords it has passed already—because of the existence of the power of the Government of the day by nomination to swamp any existing opposition. Substitute an elective Council and that power passes from the administration and becomes vested in the country. The Senate then takes up, apart from finance, and apart from any right to interfere in the determination of which political party shall control, all the functions of a Legislature, not only revision and initiation, but the full right to criticize, examine, and, if necessary, to condemn the administration of public affairs.

In the course of the same debate the Hon. Mr. MacGregor quoted words used in 1891 by the then Prime Minister (in introducing the Bill which substituted a term of seven years for the original life appointments):

If we are in favour of a second Chamber then we want that Chamber to be a deliberative body—not so constructed as to obstruct the will of the people, not to oppose the deliberate opinion of the country, but a body to reconsider questions, to put them in a different light, and ultimately, when public opinion has declared itself, to yield to the force of public opinion. It seems to me that this is the only logical reason for the existence of a second Chamber.

The hon. gentleman then proceeded as follows:

I doubt very much whether anyone could now maintain, with any degree of force, that the change introduced in 1891 can properly be described as a reform of this Council, because I find, from my reading of Hansard, and from the speech made by the Minister yesterday, that this Council seems to be unanimously of opinion that a change is necessary —it seems to be generally admitted that a change is necessary from the

nominative system to some form of election. It would seem to follow, then, that the reform introduced in 1891 was no reform; and I think this was so, for the simple reason that the conceptions of many members were altogether too narrow. I am aware that a great many members of this Council considered that the functions of the Council were merely to revise measures sent down to them from the other House. Now, such a view always seemed to me to be an exceedingly poor, meagre, paltry and contemptible idea of the functions of a second Chamber.

Privilege.—On the question of privilege, Legislative Councillors as a body have been consistently sensitive. The Bill which was passed in 1914 (after Bills to the same effect had been introduced in 1912 and 1913) was introduced in the Legislative Council, and emphasis was laid on the fact that the right to initiatereform of the Council was the Council's privilege. In 1919 there was introduced in the House and transmitted to the Council a Bill called the Women's Parliamentary Rights Bill, in which it was proposed to enact that a woman should not be disqualified by sex or marriage from appointment or election as a member of the Legislative Council or House of Representatives. This Bill was taken exception to by the Hon. the Speaker of the Legislative Council on the ground that it infringed the privileges of the Council, and he directed accordingly that the Bill be altered by eliminating all matter relevant to the Council. The Bill was altered in accordance with the direction of the Hon. the Speaker, and the House of Representatives accepted the amendment.

Instances of Amendments of Bills effected by Legislative Council.—The Statutes Revision Committee of the Council has in the past freely exercised its power to require the attendance of witnesses and to hear evidence on proposed measures. As the result of such investigations it has frequently happened that it has made recommendations for the amendment of Bills submitted for its consideration, which have been accepted by the Council and ultimately by the House of Representatives. A noteworthy instance in recent years is the Marriage Amendment Act of 1920. As the result of inquiries conducted by the Statutes Revision Committee (at which representatives of the Roman Catholic Church and of the Protestant Political Association and other persons were heard) a clause was inserted in the Marriage Amendment Bill and was finally passed by both Houses which made it an offence, punishable on summary conviction by a fine of £100, to allege expressly or by implication that any persons lawfully married are not truly and

sufficiently married or to allege expressly or by implication that the issue of any lawful marriage is illegitimate or born out of true wedlock.

The inquiry involved a consideration of certain literature said to constitute a " Catechism " for the inculcation of Roman Catholic doctrines in relation to mixed marriages, and of the " Ne Temere " Decree.

In this review I have dealt only with the Constitution and functions of the Legislative Council; any criticism of the Council, as at present constituted, is criticism by its own members. It is, however, obvious that the present system of appointment (for seven years) is unsatisfactory; and no public statement has been made as to when (if at all) it is intended to bring into force the elective system provided for in the Act of 1914.

THE CONSORTIUM OF THE MARRIAGE CONTRACT. RIGHTS AND REMEDIES OF HUSBAND AND WIFE.

[*Contributed by* BRAM THOMPSON, ESQ.]

IN no branch of jurisprudence is uniformity more necessary than in that which relates to the marriage contract. In none is it so essential that the rights arising from that contract should be clearly defined. Yet even within the British Empire neither uniformity nor clarity characterizes the law governing the matrimonial relationship.

The marriage contract at all events since the Reformation period has been a Civil or Common Law contract. In durance it is life-long and *ex necessitate* it involves reciprocations by both the contracting parties. By it the wife acquires a status with the ancillary duties and the husband incurs obligations, while both are invested with rights respecting its maintenance and its violation.

The personal relationship created or established by the marriage contract between husband and wife is called the Consortium. It is intrinsic and vital; and its maintenance does not adhere to one party more than the other. Except where affected by statute, the rights arising from the marriage contract are Common Law rights. These rights, *inter se*, are well defined, and their enforcement, *inter se*, is effected by remedies derived entirely from the Canon or Ecclesiastical Law—the divorce *a vinculo*, for instance, and the divorce *a mensa et thoro*. They are now virtually statutoryized with here and there in the Empire somewhat changed nomenclatures; and I have no need to discuss them.

The rights against third parties are in a different position. Those of the husband have in the course of years been gradually evolved. But the rights of the wife in the Consortium and her remedies against third parties for violating it still constitute one of the law's polemics—one of its most urgent, unsolved problems.

It is this problem I propose to discuss.

The husband had under the Common Law two remedies against third parties. One was an action for Criminal Conversation and the other was for alienating the wife or causing her to leave him. The difference between them lay not in the *jus* but in the *remedium*. Both were based upon the loss of the Consortium created or established by the marriage contract; but the Criminal Conversation action alleged adultery as the *causa causans*, while the other action, which was sanctioned in 1763 by *Winsmore* v. *Greenbank* (Willes 578), admitted any other tortious act to be pleaded as the *causa causans* of the same identical loss.

The Criminal Conversation action required no other claim than that of adultery *per quod consortium amisit*, though to it, for the augmentation of damages, frequently was added the claim *per quod servitium amisit*. The law had for many years forced this action upon the husband: for the system of procedure prior to 1857 made it essential to a petition by him for a Private Divorce Act that he should previously have recovered in such an action a verdict for damages against the paramour. No such requirement seems to have existed in the case of a wife's petition; and this fact alone may go far to explain the prevalence of the Criminal Conversation action and the absence of any corresponding action by the wife.

This form of action, so far as concerned the husband, was abolished in England by the Matrimonial Causes Act, 1857; but the same Act provided or substituted another remedy by petition in the Divorce Court thereby established for precisely the same tort or injury. The enactment, in fact, left intact and unimpaired the right of redress and merely shifted the jurisdiction from the Common Law Court to the Divorce Court; but in the new forum the euphony of "Criminal Conversation" was replaced by a straight claim for damages for the adultery and the consequences ensuing therefrom.

There was no corresponding provision made in the Act of 1857 with respect to a wife; and the inference at once arose that the wife had no similar right to safeguard or for which she needed a legal remedy corresponding with or analogous to that of her husband. That inference has grown into a theory and crystallized into a dogma. But has it any basis; or is it true?

Several of the Provinces of Canada are immune from the enactment of 1857, while several of them have it in full operation. But these latter have, I think without exception, restored the Criminal

Conversation action to the husband without saying anything whatever as to the right of a wife. This itself, while due to the inference I have stated, has in turn served to strengthen the assumption that the wife has no legal right in the Consortium of the marriage contract except as against her husband.

In none of the authoritative texts do we find any definite statement as to this right of the wife. Wherever it is mentioned it is treated as a moot question upon which no one seems to have the courage to be positive; and certainly it never was put to a judicial test till the case of *Lynch* v. *Knight* arose about 1860. *Vide* 9 H.L.C. 589 and L.T.R. vol. 5 (N.S.) 291. In this case, however, there was no element of adultery. It was not in the nature of an action for Criminal Conversation, but was an action by a married woman for slander, the effect of which was, she alleged, that her husband left her. In legal terms, through the slander of a third party she lost her husband's Consortium, and for that she sued the slanderer. It was an Irish case, and the injured wife obtained a verdict. It went first on appeal to the Exchequer Chamber in Ireland on the question of the non-tenability of the action. But the Exchequer Chamber affirmed the right of action and sustained the verdict by four Judges to two. Thence it went to the House of Lords on Appeal, and there the Exchequer Chamber was reversed, not however on the question of the right of action but on the subsidiary question that the loss of the husband's Consortium was not the necessary or inevitable consequence of the slander. The case throughout was treated as one of ordinary slander; and it was decided strictly under the Common Law.

For some years after that the subject remained quiescent, and then a number of cases began to roll up first in the United States of America and next in the Dominion of Canada. They were all cases subsequent to the enactment of the Married Women's Property Acts and they swayed sometimes in one direction and sometimes in another; but the remarkable thing about them is that whatever way the judgment went, the Court almost invariably relied upon *Lynch* v. *Knight* as its authority. This is even more remarkable than the solitariness of the case itself.

Here is a summary of, and reference to, these American and Canadian Cases.

In 1871 *Clark* v. *Harland*, 1 Conn. S.C. 418, affirmed the wife's right of action in Connecticut; and several more followed. In 1877, however,

Van Arnam v. *Ayres*, 67 Barb. 544, went the other way. Then came a series of cases in various States upholding the right thus: In 1879 *Beiman* v. *Paash*, 7 Abbott N.C. 249; in 1885 *Baker* v. *Baker*, 16 Abbott N.C. 293; in 1889 *Foot* v. *Card*, 6 L.R.A. 829, in Connecticut, and in the same year *Bennett* v. *Bennett*, 6 L.R.A. 553, in New York State; in 1891 *Warren* v. *Warren*, 14 L.R.A. 545, in Michigan, and *Haynes* v. *Nowlin*, 14 L.R.A. 787 in Indiana; and in 1895 *Hodgkinson* v. *Hodgkinson*, 27 L.R.A. 120, in Nebraska. Interspersed among these and generally quoted to the contrary effect were *Van Arnam* v. *Ayres supra*; *Duffies* v. *Duffies*, 8 L.R.A. 420, a Wisconsin case decided in 1890; *Doe* v. *Roe*, 8 L.R.A. 833, a New York case of the same year; and *Haughton* v. *Rice*, 47 L.R.A. 310, a Massachusetts case decided in 1899. But each of these has an explanation. *Van Arnam* v. *Ayres* was decided solely on the ground that the emancipation of women effected by the *lex loci* was incomplete and only invested her with the rights of a *feme-sole* as regards property; and that the Consortium was not property. This case, however, is quoted by Eversley, 2nd ed., p. 171, as a typical American decision, adverse to the wife's right of action. It is not correct so to represent it, and it is repugnant to a long array of subsequent decisions completely to the opposite effect. In *Duffies* v. *Duffies* a strong dissenting judgment was rendered which virtually neutralized the decision. *Doe* v. *Roe* merely decided, and decided rightly, that an act of adultery alone did not give a cause of action to the wife against the adulterous woman; while *Haughton* v. *Rice* laid it down, but laid it down wrongly, that adultery was essential to the action for alienating the affections.

Detailed discussion of these cases is not necessary. None of them pretends to be in the nature of Criminal Conversation actions. They are framed in tort simply for alienating, through a diversity of methods, the husband's affection. But there was one case, *Kroessin* v. *Keller*, 27 L.R.A. 685, decided in 1895, which was framed just as an action for Criminal Conversation by the husband would be framed, *mutatis mutandis*, against the adulterer, with his wife. It stopped short, however, of alleging any loss resulting from the adultery; and the Court dismissed, and rightly dismissed, the action. The Consortium, in fact, had not been lost.

Bennett v. *Bennett supra* is the most typical and complete of the American cases. The judgment is worthy of the best traditions of the English Bench; and relying on *Lynch* v. *Knight* it states:

> The cause of action for a personal injury to a married woman . . . belonged to her at Common Law, or else it would not survive to her upon the death of her husband.

It is also worth mentioning that one of the Judges who rendered this judgment rendered also a few years previously the judgment we have just discussed in the case of *Van Arnam* v. *Ayres supra*. But, besides being a later case, *Bennett* v. *Bennett* was decided on the wider issue of the wife's right under the Common Law; and it would naturally express a better perspective and the more mature view of the Judge, though, being delivered in a different forum, it might not over-rule specifically his earlier pronouncement. This, however, is a further reason why Eversley and other writers should refrain from citing *Van Arnam* v. *Ayres* as a typical American decision.

The decision in Bennett's case is now regarded very much in the light of an authority; and American law is becoming uniform in support of the principle declared by it.

The Canadian cases arose in Ontario. They, too, were for alienating the husband's affections; and adultery was alleged and proved.

In the first, *Quick* v. *Church* (1893), 23 O.R., p. 268, the Divisional Court upheld the right of action upon a motion to set aside a verdict in favour of the wife which assessed separate damages for the alienation of the husband's affections and for the loss of his support. The authorities relied on by this Court were *Lynch* v. *Knight* and some American cases which I have mentioned. This was a victory for the wife: but it was of short duration.

In 1897 another action arose almost identical in character and detail—*Lellis* v. *Lambert*, 24 O.A.R. 653. On the authority of *Quick* v. *Church* a verdict was obtained in the first instance and upheld by the Divisional Court on a motion to set it aside. But on appeal the Court of Appeal unanimously reversed the judgment, relying in its turn on *Lynch* v. *Knight* for the view that there was "No legal right in the wife at Common Law to maintain the action."

This case strongly influenced subsequent American decisions which swayed in the same direction; and, though it has no force outside the Province of Ontario, the judgment has been accepted as determinative all over the Dominion of Canada of the absence of any right in the wife to the Consortium of her husband as against third parties. Since its delivery not one action has been brought in Canada by the wife in vindication or assertion of her right. I will discuss the *ratio decidendi* of this judgment later.

With these brief remarks I go back to *Lynch* v. *Knight*; and I must say that I cannot conceive how there could be any mis-

conception as to the preponderant view of the wife's right both in the Irish Exchequer Chamber and in the House of Lords.

Of course the judgments were delivered about sixty years ago ; and some of the dissenting Judges reflected crude and antiquated notions of a woman's relationship to her husband—notions of the archaic ages of the *patria potestas,* but not of Britain at any time subsequent to the Reformation. For instance, Baron Hughes in Ireland dogmatically asserted that " the Consortium of the husband and wife is the right of the husband ; the property of the husband " ; and the loss of it is " damage accruing to the husband alone " ; while Baron Fitzgerald added whatever was wanting to this to make it ridiculous by saying that the Consortium of the marriage " involves the relationship of master and servant." Lord Wensleydale in the House of Lords enunciated similar dogmas.

In the view of Baron Hughes and Baron Fitzgerald the special damage alleged—the loss of the Consortium—could not possibly accrue to the wife. The preponderant opinion was against this ; and the Irish Exchequer Chamber upheld the right of action and the judgment in favour of the wife.

The House of Lords, however, took a cue from the dissenting judgments to side-track the main issue and to reach a conclusion on which they were unanimous, namely, that the damage was too remote ; or in other words, that the slander alleged did not necessarily cause the loss of the husband's Consortium.

In arriving at this decision, however, the Law Lords to some extent at least, gave countenance to, or assumed, the existence of the right of action itself. Without postulating its existence they could not have passed on to the consequential deduction. But while they discussed the right freely and expressed themselves emphatically, some one way and some the other, they abstained from judicially ruling the point, and decided the case, as I have stated, on the subsidiary issue. By doing this they left untouched the decision of the Exchequer Chamber in Ireland ; and I submit, therefore, that that judgment, with the emphatic endorsement of it by Lord Campbell and Lord Cranworth, is the standing authority to-day on the right of action by the wife against a third party for any tortious act which causes her the loss of her husband's Consortium established and created by the marriage contract.

I state this in knowledge of the fact that *Salmond on Torts,* 6th ed., p. 458, lays it down on the authority of *Lynch* v. *Knight* that an action will not lie against a third party at the suit of a

wife for adultery with her husband. If this means for the act of adultery alone, I agree. But if the adultery should result in the loss of the Consortium, I dissent from the author, whose opinions generally I highly value.

Now let me state briefly what the majority in the Irish Exchequer Chamber and in the House of Lords did say on this very crucial issue.

Chief Baron Pigot said :

It is impossible to maintain that either husband or wife has an exclusive interest or that each has not a common interest in that community of lot which involves mutual assistance but which does not make either the servant of the other.

There is a union of injury and loss to the wife for which the Common Law gives an action on the case.

Mr. Justice Christian said :

The injury and special damage are both laid as having accrued to her.
The action is really the action of the wife.
It is in her therefore the cause of action is vested.
I am of opinion it is maintainable.

Then after dealing with the principle of cause and effect—the remoteness of the injury from the slander—he asks this pungent question :

Is the Law blind to issues which do not touch the pocket or the person but molest the happiness of life's chief relation ?

To that he gives an emphatic negative ; and proves even by the form of the pleading—and those were the days when pleading was, in Coke's words, " the touchstone of the Common Law "—that the husband's action for Criminal Conversation was maintainable " quite irrespective of any loss whatever of a material kind." And he points out that the husband's plea was adultery *per quod Consortium amisit,* and not, as it was in the case of enticing a servant or for seduction of a daughter, *per quod servitium amisit.* One action was in fact material, the other was not. Then rallying to his support the great jurists Lord Kenyon in *Weedon* v. *Limbrel,* 5 T.R. 357, and Lord Coleridge in *Willon* v. *Webster,* 7 Car. & P. 198, he concludes that the loss of the Consortium is itself a cause of action, whether it is an action by the husband or the wife ; and speaking particularly of the case before him he says :

Here is a species of damage which, as I have shown, the law will take notice of, which is exclusively hers, of which her husband is the instrument and not the recipient.

The chief judgment in the House of Lords was that of Lord Chancellor Campbell. He had died after writing the judgment, and it was read by Lord Brougham. He lauds high the Judges of the Irish Exchequer Chamber and says but for one point he would have agreed with the majority. This one point was the connexion between the *damnum* and the *injuria*. But he was most emphatic in this :

If it be shown there is presented to us a concurrence of loss and injury from the act complained of, we are bound to say that this action lies. Nor can I allow that the loss of the Consortium or conjugal society can give a cause of action only to the husband. The loss of conjugal society is not a pecuniary loss ; and I think it may be a loss which the Law will recognize to the wife as well as to the husband.

But in the present case

The action is not maintainable because the loss or damage relied upon is not the natural and probable consequence of the injury complained of.

The action, we must remember, was one for defamatory words, not actionable *per se*, and alleging as a special damage the loss of the Consortium of the marriage contract. But Lord Campbell states :

Had these defamatory words contained a charge of adultery by the wife which the defendant pretended to know and assert as a fact, I should have thought the allegation of special damage sufficient to support the action. In that case separation would have been the natural and direct consequence of the slander.

This surely admits of no doubt, though slander in any case is but a frail basis for an action for alienating a husband's affections. They are generally alienated by methods far more diabolic.

Lord Cranworth said :

The late Lord Chancellor, I know, entertained a strong opinion in favour of the right of action. He thought that the consequential damage arising to the wife afforded her a good ground of action ; that the right of action was not confined to the husband. In the view which I take of this case I do not feel called upon to express a decided opinion

on this point. I will therefore only say I am strongly inclined to think that the view taken by my late noble friend was correct.

While Lord Brougham suggested some doubt on this point, Lord Wensleydale fell in line with the dissenters in the Irish Exchequer Chamber. But all of the Lords concurred in the judgment that the special damage alleged did not sustain the present action.

In reading the judgments pro and con, the novelty of the problem strikes us quite as much as the mists of the past which obscured it. Mr. Justice Christian's judgment was, admittedly, the light of both arcs; but while Lords Campbell and Cranworth, and to some extent Lord Brougham, reflected its rays, the dissenters both in England and Ireland failed to get even its colouring. But it is clear that while the affirmers of the wife's right stood upon principles the dissenters rested on negative theories, and assumed from the absence of case law that the right did not exist.

All through the early development of the Common Law the Courts were constantly confronted with similar phenomena; and if they had been deterred by them the plight of our jurisprudence to-day would have been deplorable. Happily they were not; and hence the English-speaking nations rejoice in the splendid heritage of a highly evolved Common Law.

But besides the fallacy about precedents there runs through the judgments, not only of the dissenting Judges in *Lynch* v. *Knight*, but also in the American and Canadian Courts, a thread of confusion between the right of a married woman and her capacity to exercise or enforce it. In other words there was a failure to apprehend the true status of the married woman under the Common Law.

When a woman married she acquired a status involving a species of tutelage under her husband; and as a consequence her capacity—her dominium, her individual volition—became somewhat impaired or trammelled, or might be suspended, during the coverture. She did not, however, lose her rights, even the right of property. But the husband, by the marriage, engrafted a right of his own upon the right of the wife; and in this way, and by exercise of this engrafted right, he could in certain respects supersede the right of his wife or exercise her dominium or capacity. He could, for instance, alienate her leaseholds by deed *inter vivos*, and he could become owner of her personal property (including her choses in action) by the use of *force majeure*, that is by reducing it into possession.

But there were some rights of the wife which the husband could not touch—the right to sue for a purely personal tort in which the husband was not a participating sufferer; and the right to the maintenance intact of the marriage Consortium against all the world.

Let me explain this. The Consortium while it endured was a common right between husband and wife springing from and founded upon a contractual relationship; and both of them jointly could defend it against a common aggressor. But if either of them disrupted the relationship the right of redress instantly arose to the other. The law of divorce—the remedy, *inter se*, which is common to both husband and wife—is founded upon the recognition of this individual right in the Consortium. And being thus established, it cannot be denied or evaded when a disruption of the marriage relation or a violation of the Consortium is caused by the tortious act of a third party. The right of redress against such a party has pertained to the husband, without dispute, since *Winsmore* v. *Greenbank*; and it must similarly, and as amply, pertain to the wife unless we stultify our great Common Law principle of *ubi jus ibi remedium.*

This great truth about the individuality and equality of the wife's right in the Consortium was obscured by the practice which long prevailed of joining or compelling the joinder of the husband in any action of tort brought by a married woman. It was assumed that this practice indicated an incapacity in the wife to maintain the action alone. The assumption was not justified and it involved a gross error. The practice was a rule of procedure merely and not a rule of law, and it was worked out by a plea in abatement. The husband by the rule might be joined because he had really some interest in the action, as for instance if a wife sued for injuries arising from an assault or an accident. But where the wrong complained of was purely the wrong of the wife, as was the case in *Lynch* v. *Knight*, the husband was joined, *pro forma*, and merely as a security for any costs awarded against his wife. This in fact was the great aim of the practice; and if the defendant failed to file the plea within a prescribed time he was for ever estopped; the action proceeded by the wife alone, and her right to sue was unassailable. The damages in such an action by the wife belonged, and by the judgment were awarded, to her alone, even if the husband were joined as a co-plaintiff. If he got them at all, he got them by a subsequential act and not *mariti jure.*

To raise the question of the right of action—the question of law—a Plea in Bar was necessary. But there was nothing in common between the two pleas. One touched the law, the other the procedure.

It seems grotesque to join, even *pro forma*, a husband as a plaintiff in an action in which he was not a joint sufferer but a joint tort-feasor. But there was only one such action, as we know, in England ; and if there had been more, doubtless the Courts would have held the rule inapplicable or would have provided another. Such a rule to-day would be impossible in view of the Married Women's Property Acts.

As an authority for what I have stated relating to the right and capacity of a wife to sue for an individual tort or wrong, the best I can do is to cite *Weldon* v. *Winslow*, 13 Q.B.D. 784 (1884), where Brett and Bowen, L.JJ., laid down substantially what I have stated. The same conceptions manifestly operated on the minds of the great jurists who upheld in *Lynch* v. *Knight* the right of action by the wife—Chief Baron Pigot, Mr. Justice Christian, and Lords Campbell and Cranworth.

What is perplexing is the twofold interpretations placed upon these lucid judgments by the Courts both in Canada and the United States of America, especially after these Courts had the benefit of the clear exposition of the married woman's position by *Weldon* v. *Winslow* (1884).

The Canadian case of *Lellis* v. *Lambert* is peculiarly offensive in this respect. The Appeal Court Judges had before them the earlier case of *Quick* v. *Church* (1893), which had followed the majority ruling in *Lynch* v. *Knight* and reflected what was taught by *Weldon* v. *Winslow*, and they had also the ruling of the Divisional Court in the case at Bar which was in unison with *Quick* v. *Church* ; and yet they set themselves doggedly and defiantly to demolish the earlier judgment, not by adducing reasons or principles against it, but by stating its direct converse in the face of all authority. Their spirit is evinced by this opening declaration of Mr. Justice Osler, J.A.

> The action of the husband against the adulterer is one which has always been regarded as a blot on English jurisprudence and social manners ; and it cannot but be regretted if it appear that one result of the emancipation of woman is to confer on her the right to maintain a corresponding action against the adulterer.
>
> The principle of the English Law is complete union of the husband and wife. That is still her matrimonial status.

After such a prelude there is no need to marvel at this :

I read the Judgment of Lords Campbell, Wensleydale, and Brougham in *Lynch* v. *Knight* as indications of their opinion that the wife had no cause of action against the husband's paramour . . . by reason of the status of the wife as regards the husband.

Nor at this, speaking of the Ontario Married Women's Property Act :

I cannot regard the Act as extending to confer such a right of action on the wife as is here contended for.

The judgment of Chief Justice Burton is even more partial. For instance, it quotes from Lord Campbell thus :

The better opinion is that a wife could not maintain an action for Criminal Conversation.

But it leaves out the close of the very same sentence which runs thus :

But I conceive that this rests on the consideration that by the adultery of the husband the wife does not necessarily lose the Consortium of the husband.

Not only does Lord Campbell thus explain the statement of a doctrine which he did not himself support, but a considerable part of his judgment is, after this very statement, taken up with elaborating and clinching the opposite view—his own view, and the view with which he set out—that if there is

a concurrence of loss and injury from the act complained of we are bound to say this action lies.

There is no justification for thus interpolating Lord Campbell's judgment. It is a senseless perversion.

The difference, let me say, between the two cases of the husband and the wife losing the Consortium through an act of adultery is that while the law will infer the loss of the Consortium from the adulterous act of the wife, no such inference will be made in the case of an adultery by the husband ; but the wife suing a third party for it must substantively prove it. This makes no radical difference in the right itself. The difference is in the evidence—the form of proof ; and the proof being made the rights are equal. Lord

Campbell explains this, and so do some of the others, especially Mr. Justice Christian, in their judgments.

Mr. Justice Maclennan is even more offensive than his two colleagues in *Lellis* v. *Lambert.*

He starts off with repeating an exploded theory that :

> all actions for wrongs or injuries to a married woman had to be brought by the husband alone or by him and the wife jointly.

And then in the same fragmentary way he quotes the partial excerpt already given by Mr. Justice Burton from the judgment of Lord Campbell thus :

> Even Lord Campbell said that the better opinion was that a wife could not maintain or join in an action for Criminal Conversation against the paramour ; and the reason he gave shows he thought she could not bring such an action even if the seduction was followed by loss of the Consortium.

Lord Campbell, as I have shown, did not state this at all. He stated the exact converse of it, with an exposition of the fallacy underlying what he ironically called " the better opinion."

And now let me ask, why should not the action of the wife lie for the loss of the Consortium of the marriage contract ?

The integrity of the Consortium is as precious to the woman as the man ; and there is no reason why the rights of the woman should not be equal to those of the man against anyone who impairs it. An individual infraction might not, indeed, appear so heinous in the case of the man as of the woman, and the consequences might not be so irreparable. But these divergences relate to the *quantum* of the damages and not to the right of compensation at all. Damages in torts are awarded commensurate with the injury. But the right to recover may exist even though the *quantum* of loss be trivial. Nay, even if it be incapable of monetary estimation or value. If the Consortium is a right, its invasion is an actionable wrong ever since the time of *Ashby* v. *White.*

But there is another aspect of the matter which, in concluding, I would submit.

The Consortium is established or created by the marriage Contract. It is a right which rests upon contract. The husband and wife are the two parties to that contract—a civil contract. It is not any more a sacerdotal ceremony whose superb ethical conception of " the twain being one flesh " was in the course of ages

debased or brutalized into the dogma of absorption—the extinction or annihilation of the wife in the husband—which was the stagnating heresy of mediæval feudalism. Surely in this day it is dead.

The Consortium, then, being a civil contract for the maintenance and performance of which the wife and the husband have their distinctive civil rights, I ask why should the same right of action not exist against a party who interferes with or procures or induces the breach or violation of a marriage contract as does exist against a person who acts a corresponding tortious part in relation to any other civil contract? Why, in other words, should the doctrine or principle evolved from *Lumley* v. *Gye*; *Bowen* v. *Hall*; *Templeton* v. *Russell*; and *Quinn* v. *Leathem* not apply to the tort-feasor in relation to the contract of marriage? And why in the name of our honoured Common Law should not the right pertain to the wife as well as to the husband? There is no reason within the orbit of sense and none could be found unless we revolt to the sophistry of paganism, concerning the absorption of the wife in the husband.

THE CONSTITUTION OF EGYPT.

[*Contributed by* NORMAN BENTWICH, ESQ., M.C.]

ON April 19, 1923, the King of Egypt issued a royal rescript promulgating a Constitution for his Kingdom ; and Egypt is now numbered among the constitutional monarchies. It was almost exactly forty years since the country, then an autonomous province of the Ottoman Empire, received its first Constitution. An " organic law " was issued on May 1, 1883, shortly before the British Occupation, which provided for the organization, composition and functions of provincial councils, a legislative council and a general assembly. That law has been modified by several enactments, of which the most important was a law issued in 1913 which provided for the creation of a new elected Legislative Council with larger powers. The Council was to consist of 17 nominated members, representatives of minorities, and 66 elected members. After its first session in 1914, the circumstances of the war prevented the Council becoming an effective body, and it did not in fact hold any other session. Negotiations for framing the new Constitution have been continued for a period of nearly three years, and have produced the present instrument, which, on the one hand, invests Egypt with a complete and comprehensive charter of fundamental rights, and, on the other, provides fully for the organization and functions of the principal organs of the Government.

Most of the provisions of the Constitution are derived from the regular models of European public law, but the sections relating to the Legislature and the Ministry contain certain original provisions.

Introduction.—The first section declares that Egypt is a sovereign State, free and independent. Its rights of sovereignty are indivisible and inalienable. Its Government is an hereditary monarchy with representative institutions.

The second section contains a declaration as to the rights and duties of the Egyptian people. Egyptian nationality is to be determined by a special law. All Egyptians are equal before the

law, and enjoy civil and political rights without distinction of race, language or religion; but Egyptian nationals alone are generally admissible to public functions, and foreigners will be admitted only in exceptional cases. On this point it may be noted that the number of foreigners employed in the existing Egyptian Administration is being rapidly reduced; and that a law providing special terms of compensation for all foreign officials who desire to retire from a service has recently been passed.

Rights of Man.—The clauses defining "the rights of man" which are usual in foreign Constitutions are reproduced in the regular form of a sweeping principle qualified by legal restriction. Thus, nobody may be arrested or put in prison, except in accordance with the prescriptions of the law. The domicile is inviolable, except that a search may be carried out in the cases prescribed by law. Correspondence is secret, except in cases prescribed by law. The Press is free within the limits traced by the law, and the preventive censorship is forbidden. The right of teaching is free, provided that the teaching is not contrary to public order. The right of association is granted, subject to the control of the law.

Some of these general clauses establish rights which have in the past not been protected. Article 7 declares that Egyptians cannot be expelled from Egyptian territory. Article 10 prohibits the penalty of general confiscation of property. Article 12 declares that liberty of conscience is absolute; and Article 19 provides that elementary education is compulsory for children of both sexes and is to be free in the public "maktabs," that is, infant schools. Article 22 consecrates the traditional rights of all Oriental peoples to address petitions to public authorities.

Chapter 3 deals with the distribution of powers, and starts with a prelude that all powers emanate from the nation. The ultimate sovereignty lies not with the King, but with the people, and the Egyptian monarchy is therefore not an absolute but a constitutional monarchy.

The Legislative Power.—Legislative power is exercised by the King, together with the Senate and Chamber of Deputies; and no law can be promulgated unless it has been voted by Parliament and sanctioned by the King. That principle, however, is qualified by a provision (Article 41) which authorizes the King to issue Decrees having the force of law during an interval in the sessions of Parliament when urgent action must be taken. Par-

liament, however, in that case, must be immediately convoked in an extraordinary session, and these provisional Decrees are submitted to it at its first meeting; and in case they are not so submitted or are rejected by either Chamber, they will cease to have the force of law. A similar power is included in the Ottoman Constitution of 1908.

The Executive Power.—The executive power belongs to the King and is exercised together with the Council of Ministers; chapter 2 of this title deals with the executive. The throne is declared to be hereditary in the dynasty of Mohamed Ali, and the succession to the throne is regulated by a rescript of April 1922. The King is the supreme head of the State; he sanctions and promulgates the laws, and possesses the power of veto over a law voted by Parliament, under which he may refer the Bill for further examination within one month. If the Bill, after being so referred, is again passed by a majority of two-thirds of the members in each Chamber, it has the force of law and must be promulgated. If it does not obtain a majority, it cannot be considered again during the course of the same session; but if in a subsequent session Parliament votes the Bill, though with a simple majority only, it becomes law. The royal veto, it will be seen, is very narrowly restricted.

The King.—The King has the right to dissolve the lower Chamber, and he can adjourn a session of Parliament, but the adjournment may not exceed one month, and cannot be renewed in the same session without the consent of both Chambers. He can convoke Parliament in case of necessity for an extraordinary session, and must do so when required by an absolute majority of the members composing either Chamber. The King confers titles and ranks; he organizes the public services; he declares martial law (*état de siège*) but must immediately notify the declaration to Parliament which decides whether to maintain it or cancel it. If martial law is declared during the parliamentary vacation, the Parliament must be immediately convened.

The King is the supreme commander of all the forces; he declares war, makes peace, and concludes treaties; but it is provided that he cannot declare an offensive war except with the consent of Parliament. Treaties of peace, of alliance, commerce and navigation, or any which involve the modification of the territory of the State or a devolution of its sovereign rights, or any charge on the public Treasury, or any infringement of public or private rights of Egyptian citizens, must receive the consent of

Parliament. It is expressly laid down that the secret articles of a treaty cannot destroy the effect of published articles.

The King exercises his powers through his Ministers whom he nominates and dismisses. With regard to the succession, in the absence of an heir, the King may nominate his successor with the assent of the two Chambers assembled together. Three-quarters of the members of each Chamber must be present, and a majority of two-thirds of the total assembly is required to give validity to this resolution. In case of a vacancy to the throne, in default of an heir or of a duly nominated successor, the two Chambers must immediately assemble together to elect a King : the election must take place within eight days of the meeting and the regulations as regards quorum and a majority pertain. If within eight days no result has been obtained, the Assembly proceeds to an election on the ninth day, and whatever the number of persons present or the majority obtained, elects the King. Between the death of the King and the taking of the constitutional oath by the successor to the throne, the Council of Ministers exercises the constitutional powers of the King. A law establishing a civil list is passed on each accession to the throne.

The Ministers. — The Council of Ministers is the head of the administrative services. No foreigner and no member of the reigning dynasty can be a Minister. The European principle of cabinet solidarity is prescribed ; and the acts of the King in affairs of State are only valid if countersigned by the President of the Council of Ministers and the particular Ministers concerned.

It is not expressly prescribed that the Ministers shall be members of the Chamber of Deputies or the Senate, but they have free access to either Chamber and the right to be heard whenever they ask for it. They can only vote in either Chamber if they are members of it. The Chamber of Deputies can procure the resignation of a Ministry or the retirement of a Minister by passing a vote of no confidence affecting the one or the other. The same Chamber alone can impeach a Minister for any offence committed in the exercise of his functions. The accusation must be supported by a majority of two-thirds.

Following French procedure, a special Court of justice is established for trying Ministers which corresponds in its composition to the Court prescribed in the Ottoman Constitution. The Court is presided over by the President of the Highest Native Court and is composed of 16 members, 8 of whom are judges of that Court taken

in order of seniority, and 8 senators drawn by lot. If the number of the judges of the highest Court is inadequate, the Court will be completed by the Presidents of the Courts next in rank. The special Court applies the Penal Code so far as it covers the offences charged ; a majority of 12 voices, that is, three-fourths of the total Court, is required for a conviction.

Parliament.—In accordance with European precedents Parliament consists of two Chambers, the Senate and the Chamber of Deputies. The Senate is composed partly of nominated members and partly of members elected on the basis of universal suffrage. The King nominates two-fifths of the members and the elected are chosen from each Mudiria (or province) or Governorate (of which there are three, Alexandria, Cairo and the Canal Zone) on the basis that every 180,000 inhabitants or a fraction of that number not less than 90,000 elects one senator.

An attempt is made to constitute an aristocratic Chamber. To be a senator a candidate must be at least forty years old and must belong to one of the following categories : (1) Ministers, diplomatic representatives, Presidents and members of the Court of Appeal or Tribunal of equal rank, general attorneys of the State, heads of the Order of Advocates, officials of the rank of Director-General or higher, whether active or retired ; (2) the higher ranks of the Moslem Ulema (that is, men of learning) or other clergy, general officers, ex-deputies of Parliament who have been members of two legislatures, owners of property paying an annual tax of at least £E150 a year, or persons with an annual income of at least £E1,500 and concerned in financial, commercial or industrial enterprises or following one of the liberal callings.

A senator is elected for ten years ; and half the Chamber is renewed every five years. The President is nominated by the King, and two Vice-Presidents are to be elected from among the members by the Senate. These officers hold office for two years, but may be re-elected.

The Chamber of Deputies consists entirely of members elected on a basis of universal suffrage, that is to say, universal male suffrage. Progressive as it is, the Constitution of Egypt has not yet accepted the principle of the female vote. The election is conducted by a system of primary and secondary election, on the basis that each Mudiria or Governorate containing 60,000 inhabitants or more elects one deputy for every 60,000 persons, a fraction of that number not less than 30,000. The electoral law lays down the

qualifications of a candidate, who must be at least thirty years old. A member holds office for five years ; and it is expressly provided that he represents the whole nation, and is not bound by any mandate given by the electors. The Chamber elects at the beginning of each session, from amongst its members, a President and two Vice-Presidents who are subject to re-election.

Each of the two Chambers determines the validity of the mandate of its own members ; and no mandate can be invalidated except by the majority of two-thirds. It is provided, however, that the authority for determining the validity of an election may be transferred by law to some other body.

Parliament is to be summoned each year by the King in the month of November, and, in default of convocation, it meets of its own right. The ordinary session must extend over at least six months. The two Chambers must be sitting at the same time, and one cannot sit without the other outside the period of the regular session.

Neither Chamber can pass any resolution unless at least the half of its members are present.

Every Bill, before it is considered by either Chamber, is to be sent to a Committee for examination and report, and every Bill presented by one or more private members is, in the first place, sent to a Committee which decides whether it shall be submitted to the Chamber at all.

An original provision to guard against the influencing of Parliament is that no members except such as hold a public office which can be combined with their parliamentary mandate may accept any grade or decoration other than a military decoration during the period of their mandate. The members are to receive an annual salary which will be determined by law.

Where the two Chambers have to sit together, the presidency of the Congress belongs to the President of the Senate, and there must be an absolute majority of each Chamber in order that any resolution may be passed.

The Judiciary. — The chapter which deals with the judicial power begins with the general principle that the judges are independent and are not subject in the administration of justice to any authority other than the law. An original requirement is that every person charged with " crime," that is, an offence punishable with more than three years' imprisonment, must be provided with a defender.

Local Government. — The next chapter of the Constitution deals with the Provincial and Municipal Councils, which had their place in the original organic law issued in 1883. The provinces, towns and villages are declared to be juristic persons which are represented by these Councils. The organization and functions of the Councils are determined by special laws which must embrace certain principles :

(1) The choice of the members of the Councils by election, with the condition that certain members may be nominated ; (2) the attribution to the Councils of everything of local concern ; (3) publicity of their budgets and their accounts ; (4) publicity of their sittings ; (5) the intervention of the legislative or executive power to prevent the Councils exceeding their functions, and to annul any act which violates this condition. This last provision gives to the Executive a power which under the British system is normally exercised by the judicial body.

Finance.— The section dealing with finance prescribes that every tax can only be established, modified or suppressed by law, and that nobody can be exempt from paying taxes except as provided by law. Any public loan or liability which may be imposed on the Treasury can be contracted only with the consent of Parliament. Any concession having as its object the exploitation of the natural resources of the country, or a service of public utility, and any monopoly must be accorded by a special law for a limited time.

The annual budget is submitted to Parliament at least three months before the beginning of the financial year ; it is first discussed and voted on in the Chamber of Deputies, and the session of Parliament cannot be closed until the vote on the budget has been taken. The section of the budget which concerns the public debt cannot be modified in any way which would affect the obligations of the Egyptian State, and the same rule applies to any item of expenditure on the budget which is entered in view of some international engagement.

Chapter 5 deals with armed forces, but lays down merely that a special law fixes the numbers of the Army and the method of recruitment, and the organization and functions of the Police.

General Provisions.—The sixth chapter contains a number of general provisions. Islam is declared to be the State religion, and Arabic the official language. Extradition of political refugees is prohibited, subject to any international agreement aiming at

social order. No amnesty can be accorded except by a law; and a special law is to determine the method in which the King exercises his powers with regard to religious establishments, wakfs (*i.e.* charitable foundations) that are administered by the Ministry of Wakfs, and any general matters concerning the religious communities admitted in the country.

The Constitution is not to affect the obligations of Egypt towards foreign States, nor the rights which foreigners have acquired in Egypt in virtue of laws, treaties or established practice. The old laws, therefore, with regard to the jurisdiction of the Mixed Courts, and all the privileges of foreigners derived from the Ottoman Capitulations, which have been considerably extended in Egypt by custom and practice, will remain intact until some new agreement is made with the Powers. The abolition of the Capitulations in Turkey does not impair the special position of foreigners in Egypt, which has obtained a sanction independent of the treaties of the Powers with Turkey. The Constitution cannot under any pretext be suspended except temporarily in time of war or of a "state of siege." In any case the meeting of Parliament, as laid down in the Constitution, cannot be interrupted. This provision would appear to be directed particularly to prevent the recurrence of a state of affairs which existed during the whole period of the war, when the Legislative Council prescribed by the law of 1913 was not once convened.

The King, or either of the Chambers, can propose the revision of the Constitution, but with the condition that the provisions as to the representative and parliamentary character of the Government, the order of succession to the throne, and the principles of liberty and equality guaranteed by the Constitution, cannot be touched. The revision of the other parts of the Constitution can be decided on by a simple majority vote of either Chamber, and then the two Chambers are to confer on the proposals for revision. At least two-thirds of each Chamber must be present and the resolutions must be passed by a majority of two-thirds of those present.

Finally, it is prescribed that the Constitution applies to the kingdom of Egypt but does not affect the rights which Egypt possesses over the Sudan. Those rights have not yet been finally settled by any arrangement with the British Government, which at present exercises a condominium in the Sudan; but the Prime Minister in the dispatch submitting the Constitution to the King

notes that an assurance was given by the British High Commissioner in Egypt that His Britannic Majesty had no desire to question the rights that Egypt had in the Sudan or in the waters of the Nile. The title of the King of Egypt is to be finally determined when the special authority has decided upon the definite status of the Sudan.

The Constitution ends with a title containing certain transitory provisions, of which the only one that calls for notice ordains that the law of 1922, which regulates the liquidation of the properties of the Ex-Khedive and restricts his rights, is to be treated as a part of the Constitution and cannot be the subject of revision.

The Constitution will come into full force when the new Parliament, of which the election has been carried out, assembles. Egypt, therefore, will be subject to full parliamentary government from 1924, and, in the words of the declaration made by the former Prime Minister: "It belongs henceforth to the Egyptian people to prove, by the manner in which it will assure the application of the Constitution, that it is truly fitted to incur the high responsibilities which have been entrusted to it."

THE FRENCH PENAL LAW RELATING TO CRIMINAL ASSAULTS ON MINORS.

[*Contributed by* P. REUTENAUER, *Docteur en droit, Substitut du Procureur-Général près la Cour d'Appel de Lyon.*]

CHASTITY can be outraged both physically and morally; it is necessary, therefore, to distinguish between criminal offences against the person of minors and those which are injurious to their morality.

Indecent Assaults on Minors.—Criminal offences committed against the person of minors of one sex or the other are provided against by Arts. 331, 332 and 333 of the French Penal Code, the provisions of which—in force since 1808—have been amended on this point by the Law of April 28, 1832, and by that of May 13, 1863. They constitute crimes punished by hardship and degradation,[1] and tried by the Court of Assize, which is the highest penal jurisdiction in France.[2]

The fundamental distinction in the matter lies in whether the assault has been committed with or without violence. Minority is not a constituent element of the crime unless the assault has been committed without violence. In the case of an assault with violence, punished even if it has been directed against the person of a major, minority only intervenes as an aggravating circumstance—that is to say, involving the application of a severer penalty.

[1] Under French Penal Law, its violations are divided into three categories according to the gravity of the penalties inflicted for their repression: (1) felonies tried by the Courts of Assize and punished by hardship and degradation, death, hard labour for life, or for five to twenty years' imprisonment (*réclusion*) for five to ten years, deportation for life, detention in a fortress for five to twenty years (the last two penalties are reserved for political crimes) or degradation only (banishment, civic degradation); (2) misdemeanours tried by the Correctional Courts and punished with imprisonment (minimum six days, maximum five years) or by a fine of a minimum of frs. 16; (3) "contraventions" tried by Police Courts and punished with imprisonment of one to five days or by a fine of fr. 1 to frs. 15.

[2] The Court of Assize, which sits quarterly at the capital town of each Department and is presided over by a judge of the Court of Appeal, is composed of a jury formed of twelve citizens drawn by lot and called to pronounce upon the existence of the crime, and a Court composed of three magistrates who award the penalty.

Nevertheless, all criminal assaults, whether perpetrated with or without violence, have one common element which must first be stated, viz. the material fact of assault.

As in the case of many other breaches, the Penal Law has not defined indecent assault. It is for the Courts to decide whether the incriminating act is sufficiently grave to merit this title. But the decisions of the Courts have established certain principles. Broadly speaking, an indecent assault is any act performed directly on a person or by a person with intent to violate chastity, and which is of a nature to produce this result. The motive of the act, or the purpose of the delinquent, is of little moment ; the act itself constitutes a criminal offence whether it has for its object the gratification of sexual desire, or whether attributable to any other motive such as hatred, vengeance, curiosity. The assault resolves itself into a material act of a nature injurious to chastity. Further, it is not necessary that the obscene act be practised on the person itself of the victim ; the crime exists when a child has been employed to practise it on the person of the offender.

When an indecent act is not sufficiently grave to constitute a criminal assault and to merit infliction of a criminal punishment, it is the ordinary practice, if the circumstances of the case allow, to " disqualify " it—that is to say, to prosecute only as a correctional misdemeanour or outrage against public morals, punished by imprisonment of three months to two years, and by a fine of frs. 16 to frs. 200 (Art. 330 of the Penal Code). In this case, however, it is necessary that the element of publicity exists, and to constitute that the act must have been, or could have been, seen by a third party. Decisions of the Courts do not admit of the victim, even a minor, being considered as one of these witnesses, but she would become one, however, if, after having been the victim of an assault, she was present at a second assault committed on another person, or if the offender confined himself to an obscene act before her without touching her person, or without making her assist in a positive act of immorality. In all these cases the fact that the involuntary witness of the indecent assault was a minor does not increase the penalty.

According to the general principles of the French Penal Law, the attempt to commit a crime is penalized in like manner as a crime that is consummated (Art. 2 of the Penal Code). The attempt must have been manifested by a step towards execution of the criminal purpose, and must not have been interrupted or failed

in its purpose save by circumstances independent of the will of the offender (same Art.). Arts. 331 and 332 do no more than apply this rule to indecent assaults, taking both consummated and attempted assaults together and inflicting the same punishments for them.

It now becomes necessary to examine the two categories of indecent assault.

Indecent Assault without Violence.—Art. 331 of the Penal Code :

> Every indecent assault, consummated or attempted, without violence, on the person of a child of one sex or the other of less than thirteen years of age will be punished by imprisonment (*réclusion*).
>
> The same punishment will attach to an indecent assault committed by any ascendant on the person of a minor, even of more than thirteen years of age and not emancipated by marriage.

This text makes provision for two cases :

(1) When the offender is not an ascendant of the victim. A crime is committed only when the victim is less than thirteen years old. The law considers that a child under that age cannot give its free consent to immoral acts to which it has been subjected, or with which it has been personally associated and establishes an irrefutable legal presumption of moral violence. Above the age of thirteen years this legal presumption of moral violence disappears, and an indecent assault, however immoral the act, if it be committed without violence is no longer punishable by way of assault. But should it present the conditions of publicity required by Art. 330 of the Penal Code mentioned above, it would constitute a correctional misdemeanour or outrage of public decency, and could be proceeded against under this title.

(2) When the offender is an ascendant of the victim. In this hypothesis, in order that a crime exist, it suffices that the victim be a minor according to the civil law—that is to say, of not more than twenty-one years of age and not emancipated by marriage. " If it is indeed permitted to suppose an intelligent will in a child of more than thirteen years of age, that free will is no longer certain when it is subjected to solicitation by one of her ascendants—that is to say, by a person who exercises a natural authority over her. If a father be so degraded himself to attempt the virtue of his daughter, he commits both a revolting immorality and an act worthy of a salutary punishment so long as it is permitted to suppose

that authority and the state of dependence assisted him in his evil designs." [1]

Briefly, the presumed violence consists here in an abuse of authority, but this abuse of authority can only be apprehended up to the age of fifteen or sixteen years. How can one believe in the persistence of this irresistible influence when the victim has passed that age? Neither in law nor in fact does reverential awe suppress the moral liberty and responsibility of the offspring.

In extending the age of the victim to twenty-one years, in the case of an indecent assault committed by an ascendant, the legislation has, above all, taken into account the horror of the crime and the immorality of the agent; the ascendant whose duty it is to teach and train the minor becomes guilty of an abominable crime when he defiles her with infamous debauchery. Any severity is justifiable.

The constituent elements of the crime provided against by para. 2 of Art. 331 are thus three in number: (1) indecent assault; (2) the status of ascendant in the agent; (3) the minority of the victim.

(1) With regard to the material act of assault, there is nothing to add to what has been said above.

(2) The status of ascendant is a constituent part, and not only an aggravation, of the crime. The offence disappears if, the victim being thirteen years of age or more, the offender is not an ascendant. By ascendants is understood all those who are related to the victim by ties of parentage in a direct line resulting from legitimate marriage, and especially the father, mother, grandfathers and grandmothers of a legitimate or legitimated child, or even of a natural child legally recognized. If the natural child has not been recognized, the status of ascendant in the agent of the assault is a question of fact on which the jury's decision is supreme without their being made to observe the regulations for the legal proof of filiation. Finally, unquestionable decisions decide that by "ascendants" must not be understood parents by marriage, such as fathers-in-law, and mothers-in-law, for whom there exist no ties of blood.

(3) Majority is fixed by the civil law at twenty-one completed years of age, and is that of which para. 2 of Art. 331 takes account. An indecent assault ceases to be punishable if the minor was emancipated by marriage. The legislator has above all thought of the case, much the most frequent, where the victim is a young married

[1] Reports preparatory to the law of May 1863.

woman ; she then finds in her husband a protector who can shelter her from the demoralizing influence of her parents. Actual emancipation does not, on the contrary, present an obstacle to the application of Art. 331. Indeed, nothing could efface the crime of a guilty father's wilful act.

Minority constitutes, as has been said, a legal presumption of moral violence. But it will be seen that where in fact violence, even solely moral, has been exercised, the crime becomes an indecent assault with violence and more severely punished. The vice of consent, on which Art. 331 rests, results therefore solely from minority, but, within this limit, it is indelible and cannot disappear by proof to the contrary. The fact that the minor had formally consented to an immoral act of which it was the victim does not prevent that act from being accounted criminal. By reason of the age, this consent is considered by the law as being insufficiently free.

Para. 2 of Art. 331 appears to apply to all indecent assaults committed by ascendants on minors, even if the latter be less than thirteen years of age. But such is not the case. In point of fact, the provisions of Art. 331 must be combined with those of Art. 333. It will be seen that if the minor is less than thirteen years of age the status of ascendant in the agent of the indecent assault without violence constitutes an aggravating circumstance which augments the penalty. In consequence, para. 2 of Art. 331 does no more than affect an indecent assault without violence committed by an ascendant on a minor of from thirteen to twenty-one years of age. If the minor is less than thirteen years of age, it is the 1st paragraph of Art. 331 which must be applied, adding thereto the aggravating circumstance provided by Art. 333, that the offender is an ascendant.

The constituent elements of the two crimes of indecent assault without violence provided by Art. 331—the only ones for which provision is made by French law—have just been passed in review, and it has been seen that minority is one of these elements. With regard to the penalty, this varies, in the case of the first paragraph, according to whether the crime is accompanied or not by one of the aggravating circumstances established by Art. 333, which are common to indecent assaults with violence, and for this reason it will be examined later.

An indecent assault without violence on a minor of less than thirteen years of age is punished by :

(1) Imprisonment (*réclusion*) for a period of from five to ten years,[1] if it is not accompanied by any of the aggravating circumstances of Art. 333.

(2) A term of hard labour of from five to twenty years,[2] if it has been committed with one of such aggravating circumstances, and notably if the accused was an ascendant of the victim.

An indecent assault committed without violence by a parent on the person of a minor of from thirteen to twenty-one years of age is, in every case, punished by imprisonment (*réclusion*).

These penalties are mitigated if the jury gives the accused the benefit of extenuating circumstances provided by Art. 463 of the Penal Code.[3] For the punishment of a term of hard labour the Court must substitute that of imprisonment (*réclusion*); it may even reduce it to a penalty of from two to five years' imprisonment. Instead of imprisonment (*réclusion*), the Court may only sentence to imprisonment for a period of from one to five years.

Indecent Assaults with Violence.—Indecent assaults committed with violence form the subject of Art. 332 of the Penal Code:

Art. 332: Whosoever commits the crime of rape will be punished by a term of hard labour.

If the crime has been committed on the person of a child of less than fifteen completed years of age, the accused will be subject to the maximum penalty of a term of hard labour.

Whosoever commits an indecent assault, consummated or attempted, with violence against individuals of either sex will be punished by imprisonment (*réclusion*).

If the crime has been committed on the person of a child of less than fifteen completed years of age, the accused will be liable to a term of hard labour.

The mere perusal of this text shows that minority is no longer a constituent element of the felonies of rape and indecent assault

[1] The judgment giving sentence must state the period of punishment, between the minimum and maximum fixed by law. Imprisonment (*réclusion*) is carried out by internment, on French territory, in a house of correction, where the condemned is made to work, and in which the rules are more severe than those of ordinary prisons.

[2] Hard labour is effected by deportation of the accused to a colony (New Caledonia or Guinea) where he is subjected to penitentiary labour during the period of the punishment, then to a residence under supervision for a period at least equal to double the punishment.

[3] Extenuating circumstances apply to all breaches of the Penal Code. For crimes they are allowed by decision of the highest authority and not by the opinion of the jury, who may find justification in any extenuating circumstance.

with violence, which are punishable even when they have been committed on the person of an adult. It constitutes no more than an aggravating circumstance involving the application of a severer penalty. Further, this minority is neither that of para. 1 of Art. 331, nor that of the civil law; it is a particular minority fixed at less than fifteen completed years of age.

But since rape and indecent assault with violence are defined in the same way whether it be a question of minors or of adults, it is necessary briefly to indicate what are, in each case, the constituent elements of these two felonies.

The characteristic features of an indecent assault have been determined above. Rape is a particular kind of indecent assault —the most grave of all, as much by its nature as by the consequences which it must have for the victim and for the honour of the family. It consists in the carnal knowledge of a woman against her will. Its elements consist, therefore, in normal and illicit sexual connexion as its aim and in the use of violence as the means. Rape is, therefore, clearly distinguished from indecent assault with violence by the nature of the material act which characterizes it, and by the fact that only a woman can be the victim of it. But these two felonies are intermingled from the point of view of their manner of realization—that is to say, by violence. According to doctrine and jurisprudence, violence may be physical or moral. It may consist in a material coercion exercised on the person of the victim, and sufficient to paralyse her resistance; in threats of a nature to inspire her with fear of serious danger to herself or to her relations; in abuse of circumstances which deprive her of her means of defence, such as sleep, drunkenness, or a faint, and, finally, in the use of stratagem, as, for example, anæsthesia or hypnotism, liable to render her unconscious. This very wide interpretation of the term " violence " of which the law makes use without defining it, makes it possible to say that violence exists on every occasion where the victim has not consented, in the case of rape, to sexual union, or, in the case of indecent assault, to the immodest act.

With regard to the special case of a victim who is a minor: if she is of less than fifteen completed years of age, the penalty for rape is the maximum term of hard labour, viz. twenty years, and that for indecent assault with violence a term of hard labour for a period of from five to twenty years.

If the victim is more than fifteen and less than twenty-one years of age at the most, she is compared to an adult victim, presumed

able to withstand any physical or moral coercion, sensible, and having in consequence less need of being protected by the law. The penalty for rape in this case is no more than a term of hard labour of from five to twenty years, and that for indecent assault with violence no more than imprisonment (*réclusion*) for from five to ten years.

The extenuating circumstances allowed to the accused by the jury, as has already been stated, mitigate these penalties. The maximum term of hard labour is replaced by the minimum (five years) or by imprisonment (*réclusion*) ; a term of hard labour by imprisonment (*réclusion*) or imprisonment for from two to five years ; imprisonment (*réclusion*) by one to five years' imprisonment.

But the penalty, on the contrary, is augmented if there exists one of the aggravating circumstances provided in Art. 333, and resulting either from the status of the offender or from the plurality of agents.[1]

Art. 333 : If the offenders are ascendants of the person on whom the assault has been committed, if they are those who have authority over her, if they are her tutors, or her paid servants, or paid servants of the persons designated above, if they are officers or ministers of religion, or if the offender, whatever he may be, has been aided in his crime by one or several persons, the penalty will be that of a term of hard labour in the case provided for by para. 1 of Art. 331, and of servitude in the case provided for by the preceding article.

It is therefore seen that—

(1) These aggravating circumstances are common to rape, indecent assault with violence and indecent assault without violence committed on a minor of less than thirteen years of age (Art. 331, para. 1). In the latter case, as has already been said, the penalty of a term of hard labour replaces that of imprisonment (*réclusion*).

(2) In the case of rape or indecent assault with violence, these aggravating circumstances render inoperative that resulting from the fact that the victim was less than fifteen years of age, since the penalty of penal servitude for life enacted by Art. 333 whatever may be the age of the victim is greater than that of a term of hard labour applicable to rape or indecent assault with violence committed on a minor of fifteen years of age.

[1] It is the jury who, having replied affirmatively on the existence of the principal fact, pronounce equally on the aggravating circumstances.

If the jury, recognizing the existence of one of the aggravating circumstances of Art. 333, give to the accused, however, the benefit of extenuating circumstances, the Court must substitute for the penalty of penal servitude that of a term of hard labour, and it may even be reduced to imprisonment (*réclusion*). The penalty of a term of hard labour, in the case of assault without violence on a minor of thirteen years of age, must be replaced by imprisonment (*réclusion*) or imprisonment for from two to five years (Art. 463 of the Penal Code).[1]

These aggravating circumstances, the effect of which has just been indicated, must now be reviewed.

1. Aggravating circumstances resulting from the status of the agent.

(1) Ascendant of the victim. Reference need only be made to what has already been said on the meaning of the word " ascendant " with regard to indecent assault without violence committed on a minor of from thirteen to twenty-one years of age, for which that status of the agent is a constituent element of the crime.

(2) A person having authority over the victim. It is just as much a question of legal authority, such as that of the husband over his wife, of the guardian over his ward ; as it is that of authority in fact which is derived, not from the law, but from circumstances and the situation of the person, such as the authority of a husband over the natural children of his wife, or over those born of a former marriage ; that of a man over the children of the woman with whom he lives as man and wife ; that of an uncle over his minor nephew of whom he has the upbringing ; that of master over his servant ; of employer over his employee, etc. The criminality of an indecent assault arises, in reality, by reason of the moral influence which the offender has been able to exercise from his position ; but the effects of this influence are obviously the same, from whatever source they may be derived.

(3) Tutors. This expression embraces all masters charged either with supervision or teaching in general, or supplementary teaching such as music or dancing. The cause of the aggravation lies not only in the authority which the master exercises over his pupil,

[1] Thus indecent assault without violence with one of the aggravating circumstances of Art. 333 and the benefit of extenuating circumstances can be punished with imprisonment as if the aggravating circumstance did not exist, with this sole difference, that the period of imprisonment must not be less than two years. This is one of the singular consequences of the system, complicated as it is by aggravating and extenuating circumstances admitted by the French Penal Code.

but equally in the confidence reposed in him and the familiarity which his functions permit.

(4) Hired servants. Art. 333 extends aggravation to the paid servants of the victim herself or those of the parents, tutors of the victim and persons having authority over her. This aggravation would exist in an indecent assault committed by one domestic on another domestic of the same master.

(5) Public officers and ministers of religion. This aggravating circumstance has solely for its basis the qualification of officer or minister of religion. It is subordinated neither to the relations which that office might have established between the offender and the victim, nor to abuse of authority, nor to the facilities which that office could obtain for the agent of the assault. It applies, however, as well when the crime has been committed outside the exercise of duties or of the religious ministry.

2. Aggravating circumstance resulting from plurality of agents. The fact that the offender has been aided in his crime by one or more persons is held by Art. 333 as an aggravating circumstance. Generally, complicity by aiding and abetting is not, under French Penal Law, an aggravating circumstance of the crime; it merely exposes the accomplice to the same penalty as the principal agent.[1] It applies in like manner if the agent of an indecent assault has only been aided in acts which prepared or facilitated his crime. But if the accomplice participated directly and materially in the accomplishment of the act, he becomes, in reality, a co-agent, and incurs, like the principal agent, the aggravation of Art. 333, the crime being rendered more odious by the fact that several persons have aided one another either to overcome the resistance of the victim, or to gratify their passions the one after the other.

Sentences to hard labour or to imprisonment (*réclusion*) inflict on persons guilty of rape or indecent assault the additional penalties and forfeitures incurred by all accused who are sentenced to a criminal punishment of hardship and degradation, which it would now appear useful to indicate:

[1] Accomplices in a crime or misdemeanour are punished with the same penalty as the principal agent (Art. 59 of the Penal Code). Accomplices are considered to be those who (i) by gifts, promises, threats, abuse of authority or power, guilty plot or stratagem, have provoked to crime or given instructions for its committal; (ii) have procured arms, instruments, or any other means employed for the deed, knowing that they would be so employed; (iii) have, knowingly, aided or abetted the agent of the crime in any acts which prepared or facilitated it, or in those which accomplished it (Art. 60).

The additional penalties, of which civic degradation constitutes the greater part, are: (*a*) removal from office, and exclusion from all public duty or employment; (*b*) deprivation of the right to vote, disfranchisement, ineligibility, and deprivation of the right to wear any decoration; (*c*) incapacity to serve as a juror, to be an expert or witness in law cases, and to give evidence under oath; (*d*) incapacity to take part in a family council, to act as a guardian, trustee or sub-guardian other than in the case of his own children; (*e*) deprivation of the right to carry arms, to serve in the army, to teach or be employed in an educational establishment (Art. 34 of the Penal Code). Further, accused sentenced to penal servitude may not dispose of their property either by deed of gift to persons living, or by will, nor receive by virtue of deed or will save in the case of alimony. Any will made by them previous to their sentence is invalid (Art. 3 of the law of May 31, 1854). Furthermore, accused sentenced to hard labour or to imprisonment (*réclusion*) are, during the period of their punishment, in a state of legal interdiction; they may not administer their property, the management of which is entrusted to a trustee appointed by the family council (Art. 29 of the Penal Code). Finally, unless the sentence accorded them exemption, they lie under an interdiction of abode during a period of not more than twenty years after the expiration of their punishment—that is to say, they are forbidden to make an appearance in certain places during that time, which interdiction is signified to them by the Government before their liberation (Art. 46 of the Penal Code; Art. 19 of the law of May 27, 1885).

The father and mother being agents, co-agents or accomplices of a crime, notably of rape or an indecent assault, on the person of one or more of their children, are liable to a special forfeiture, viz. the forfeiture of paternal control instituted by the law of July 24, 1889, on the protection of ill-treated or morally abandoned children. This forfeiture carries with it deprivation of all rights and privileges attaching to paternal control, as much over the person as over the property of the child, who is placed under the authority of the mother, or put under the care of a guardian or charged to public relief. The same forfeiture *can* be pronounced against the agent or the accomplice of a crime committed on a person other than his child.

In 1919, the last year for which the Ministry of Justice published the results of the criminal statistics, 73 accused of indecent assault without violence and without aggravating circumstances on children

below the age of thirteen years were tried by the Courts of Assize, 28 were acquitted, 4 sentenced to imprisonment (*réclusion*), 29 to imprisonment of more than one year, and twelve to one year's imprisonment; 64 accused of rape, or of indecent assault with violence on children of less than fifteen years of age, or of indecent assault without violence but with aggravating circumstances were alike tried, 9 were acquitted, 4 sentenced to penal servitude, 8 to a term of hard labour, 22 to imprisonment (*réclusion*) and 19 to more than one year's imprisonment. The number of rapes and indecent assaults against adults was only 24. These crimes are, therefore, most frequently committed against minors of less than fifteen years of age.

Assaults against the Morality of Minors.—The repression of the incitement of minors to debauchery is the object of Art. 334 of the Penal Code, which the law of April 3, 1903, has completed with a view to securing the repression of a particular form of incitement known by the name of the "White Slave Traffic." The article makes provision, in reality, for five distinct correctional misdemeanours which must be studied separately. Two of these misdemeanours exclusively concern minors, two are extended to majors as well as minors, and one concerns only majors. All are punished by the same penalties: imprisonment for a minimum of six months to a maximum of three years, and a fine of from frs. 50 to frs. 5,000.

(1) Inciting minors to debauchery

Will be punished by imprisonment of from six months to three years and by a fine of frs. 50 to frs. 5,000 (1) whosoever will have outraged morality by inciting to, countenancing or facilitating debauchery or the corruption of youth of either sex below the age of twenty-one years. (Art. 334, para. 1.)

The interpretation of this text has given rise to grave controversies and to very divergent legal decisions, into the details of which it is needless for the purposes of this article to enter, confining its scope to an indication of the principles which appear to be uncontroverted.

In order to prove misdemeanour, it is necessary in the first instance that debauchery be incited, countenanced or facilitated. Incitement may have been the effect of obscene acts, or immoral or unnatural practices performed not on the minor but in her

presence. But a misdemeanour could not result from licentious or obscene discourse held in the presence of minors. The law only incriminates the material fact: the act which has for its end the defilement of the person or mind of the minor.

With regard to acts of a character to countenance or to facilitate debauchery, they are so numerous that it is impossible to set them out. The countenancing or facilitating of debauchery or of the corruption of a minor is every act having for its purpose and effect the supplying them with the means of prostitution, of accomplishing immoral acts and of gratifying their passions. It was to cover this that decisions of the Courts declared Art. 334 applicable to the occupier of a house of ill-fame, into which young people, being minors, had been admitted; to the proprietor who lets to young girls, being minors, rooms in a house frequented by women of disrepute; to a mother who is cognizant of, and encourages by material acts relations between her minor daughter and an individual. Moreover, it is not necessary to establish that the minor has been effectively seduced or perverted, and Art. 334 would still apply if the incitement to debauchery was made with regard to a minor already corrupted, even to a prostitute.

Incitement to debauchery does not necessarily imply that the offender has acted with pecuniary intent; procuring, for example, illicit relations, in his presence, with unmarried women and minors, he may only have endeavoured to excite their desires. The shameful traffic of procuration is therefore not the only one which comes within the scope of Art. 334. But the provisions require that incitement to debauchery must have had for its aim the "gratifying of the passions of others."

Direct and personal seduction, with a view to *natural* relations with a minor, does not come, therefore, within its application, even though the seducer may only have sought to gain a base reward. There is doubt on the question of whether incitement to debauchery exists when the personal and direct seduction has had for its purpose the establishment of *unnatural* relations. Doctrine questions whether Art. 334 permits of the repression of sodomy. In fact, sodomy is not proceeded against by virtue of this text, but only as an indecent assault without violence if the age of the victim permits of it, or as an outrage against morals if there is publicity.

A continuing offence is an essential element of the misdemeanour. There must be repeated acts of corruption at different periods, but plurality of victims is not necessary. The law does not say what

is the number of acts required to constitute "habitude"; this question is left to the discretion of the Court; but it is obvious that there must be at least two distinct acts and separated by a certain interval of time. Nevertheless, the decisions of the Courts lay down that "habitude" is also constituted by a state of continuous incitement to debauchery even though this uninterrupted continuation of successive acts may only have for its result a single generative act. Thus Art. 334 applies to the mother who has sold her minor daughter, and who, after having delivered her over—which is a single act—has persisted in consenting to her debauchery and has allowed her to live under her eyes in a state of concubinage; this is sufficient to constitute habitude.

Finally, it is necessary that the victim be of less than twenty-one years of age. The minority allowed here is that of the civil law. In order that a minor be considered able to resist corruption, her intelligence and her will must have attained their complete development. The prosecution is not obliged to establish that the accused was aware of the minority of the victim; it is for the accused himself to prove that he had been the victim of an error for which he was not responsible, having first taken all necessary precaution.

(2) Seduction of minors with a view to prostitution.

Art. 334, paras. 2 and 3: Will be punished by imprisonment of six months to three years and with a fine of frs. 50 to frs. 5,000 (2) whosoever, in order to gratify the passions of others, seduces, carries away or abducts, even with her consent, a woman or girl, being a minor, for the purpose of prostitution; (3) whosoever, in order to gratify the passions of others, by fraud or with the aid of violence, threats, abuse of authority, or any other means of constraint, seduces, leads astray or abducts a woman or a girl, having attained her majority, for the purpose of prostitution.

These two paragraphs, as well as the following, have been added to Art. 334 by the law of April 3, 1903. They reproduce, purely and simply, the forms of incrimination proposed by the Congress of Paris for the repression of the immoral traffic called the White Slave Traffic. They establish two distinct misdemeanours according as to whether the victim is a minor or a major. These two misdemeanours have, however, four elements in common: (*a*) The material fact of seduction, leading astray, or abduction; (*b*) the female sex of the victim; (*c*) the circumstance that the procurer has acted in order to gratify the passions of others; and (*d*) the

fact that the woman has been seduced for the purpose of prostitution. The principal characteristic element of the misdemeanour provided for by paragraph 2—the only one which is now of interest—is the minority of the victim. If the victim has attained her majority, the use of violence, threats, abuse of authority or any other means of constraint is necessary for the existence of the misdemeanour.

The expressions " seduce, lead astray or abduct " are vague and general ; it is necessary, therefore, to indicate their meaning. To seduce is to entice or incite a woman or a girl to prostitution ; to lead her astray is to carry her away or induce her to follow ; to abduct is illicitly to carry her off from her surroundings. To avoid giving to this formula too extensive an interpretation, it must be remembered that it was proposed for the repression of the White Slave Traffic—that is to say, to reach the procurers who kidnap women for brothels, who send them off or conduct them to these establishments either abroad or in France, who, in short, make money by securing recruits for prostitution. The law of 1903 has for its aim the punishment of all these acts, but these only.

It is to be noted that " habitude " is not an element of the misdemeanour. One isolated act is punishable. Neither is it necessary that the woman had effectively surrendered to debauchery ; it is sufficient that prostitution was the purpose of the seduction.

If the victim is a minor—that is to say, of less than twenty-one years of age—no other condition is required. The text is careful to add that the misdemeanour would exist if the minor had been seduced " even with her consent." It is, therefore, of little moment whether the victim knew that she would have to surrender herself to prostitution, or that she would be placed in a brothel. A minor, incapable of contracting any valid pecuniary engagement, must be protected against an act by which she disposes of her person.

(3) Retention in a brothel.

Art. 334, para. 4: Will be punished, etc. . . . (4) whosoever has, by the same means, retained against her will, even by reason of contracted debts, a person, even a major, in a brothel.

Whether the victim be a major or a minor, the constituent elements of the misdemeanour are the same : (1) that the woman who has, under whatever conditions, entered a house must have been retained there against her will ; (2) that the house is one of disrepute—that is to say, a house of which the head, whether he

be occupier or owner, authorizes and countenances prostitution therein—or, in other words, debauchery for money; (3) that the retention has been contrived by one of the means set out in paragraph 4 of Art. 334—that is to say, by fraud, or by the aid of violence, threats, abuse of authority, or any other means of constraint. One of those means, especially aimed at by the provisions because it is the most frequent, consists in making a woman contract debts, then refusing to let her go so long as they remain unpaid.

(4) Coercion to prostitution.

Art. 334, para. 4 *in fine:* Will be punished, etc. . . . (4) whosoever, by the same means, coerces a person, even a major, to surrender herself to prostitution.

The constituent elements of this misdemeanour—identical for majors as for minors—are (1) coercion by fraud, violence, abuse of authority, or any other means; (2) the fact that a person has thus been forced to surrender herself to prostitution. Coercion must have for its purpose the suppression of the free will of the woman to the point of obliging her to prostitute herself in spite of her will and against her wish. Evil counsels, exhortations which succeeded in demoralizing her and making her accept the shameful profession of prostitute could only constitute an incitement to debauchery, punishable only in the case of a victim being a minor, and again with the double condition that it must be habitual and that the counsels and exhortations were accompanied by material acts facilitating the debauchery.

These four breaches constitute misdemeanours within the sphere of the Correctional Police Courts.[1] They are punished by imprisonment for six months to three years, and by a fine of frs. 50 to frs. 5,000. If the Court gives the accused the benefit of extenuating circumstances, it can reduce the imprisonment even to six days and the fine to frs. 16,[2] or sentence to one only of these two penalties (Art. 463 of the Penal Code).

In its penultimate paragraph, Art. 334 provides for an aggravating circumstance. If one of these misdemeanours has been committed by the father, mother, or guardian, or by the other persons enumerated in Art. 333,[3] or if one of these persons rendered himself an accomplice, the penalty of imprisonment will no longer be from

[1] Correctional Police Courts try without a jury.

[2] Six days' imprisonment and a fine of frs. 16 are the minimum correctional penalties.

[3] See p. 72.

six months to three years but from three years to five years. Nevertheless, extenuating circumstances are still applicable.

Art. 335 penalizes the accused, by virtue of Art. 334, with forfeitures which are not, generally, the consequence of correctional sentences. These accused are prohibited from all guardianship and trusteeship, and from all participation in family councils for a period of a minimum of two years and a maximum of five. Furthermore, they may, under the judgment, be put under an interdiction of abode [1] during the same period, or for ten years at least and twenty years maximum, if it is the father or the mother of the victim.

Those sentenced to imprisonment for criminal assault, notably by the application of Art. 334, are penalized by perpetual disfranchisement—they are no longer either electors or eligible for election (Decree of February 2, 1852, Art. 15).

Persons sentenced to one month or less imprisonment for inciting minors to debauchery are deprived during a period of five years of the right to undertake the sale of beverages (law of November 9, 1915, Art. 4).

Finally, under the terms of the law of July 1889 (Arts. 1 & 2), the father, mother and grandparents forfeit all right of paternal authority (1) if they are guilty of, or have been accomplices in, one of the misdemeanours of Art. 334 committed on one of their children, or on a person subject to their authority; (2) if they have been accused twice for one of these misdemeanours when they had no authority over the victim. The Court may even inflict on them the forfeiture of this right as the result of a first accusation.

In 1919, of 186,234 accused, tried by the Correctional Courts, 404 were prosecuted for one of the misdemeanours provided in Art. 334; 37 were acquitted, 15 sentenced to more than one year's imprisonment, 309 to less than one year and 43 to a fine. Delinquents of this kind are, therefore, not numerous, and for this reason a certain amount of leniency is exercised in respect to them, though one would wish they could be more rigorously dealt with.

[1] See p. 75.

CUSTOM IN THE PUNJAB.

[*Contributed by* N. Hancock Prenter, Esq., I.C.S.]

I

For many years prior to the war it had been felt both by judges and the litigating public that the time was ripe for drawing up a Code embodying the main principles that underlie various customs in vogue in the Punjab. In 1915 the Lieutenant-Governor (Sir Michael O'Dwyer) requested the judges of the Chief Court, as it was then (it has now become a High Court), to take counsel together, and with some eminent lawyers, in order to decide upon the advisability of drafting a Customary Code. After much discussion the Conference recommended that the task should be attempted and that an exhaustive collection of all available information should be made as a preliminary step. The growing menace of the war prevented the taking of this step, and the unsettled state of the country in the spring of 1919 caused a further postponement; but in the summer of that year the Punjab Government appointed one of its officers as Supervisor of Codification Operations, with instructions to make a thorough survey of the customs of the Punjab, and to report to a Committee which had been appointed to carry out the work of codification. The Supervisor, after several months of strenuous work, presented his report in September 1920, and a tentative Code for the central portion of the Punjab was drawn up. Unfortunately the severe financial stringency which then closed in upon the province caused the complete cessation of operations, and Government is now waiting for better conditions before proceeding further in the matter. Much, however, has been done, and in fact there is now sufficient material, arranged in an ordered fashion, to enable a draftsman to prepare a code which would be acceptable not only to the central districts but to the entire province. Pending this consummation, it is worth while to make a brief examination of the problem with which the codifiers are faced and to estimate the chances of a successful solution.

The general nature of the problem was only too well known by all concerned. The Punjab is an agricultural country inhabited by hundreds of tribes and sub-tribes who are exceedingly tenacious of the ancient customs by which they have been governed in such matters as succession, adoption, alienation of land, pre-emption, maintenance, and so forth. There is no general adherence to any recognized body of law—such as Hindu Law or Mohammedan Law. There are no sacred writings in which the law is divulged. There are no written histories giving an account of the growth of any particular custom or of custom in general. After the Mutiny certain textbooks began to appear but they were entirely confined to a study of judicial pronouncements made by the Courts subsequent to the advent of the British Raj. In fact, a knowledge of the customs of the Punjab had to be acquired by the laborious process of recording the oral statements of the headmen of each village in the province. In order to give some idea of the magnitude of the task it may be noted that in the ten central districts of the Punjab alone there are about two hundred different tribes each of which has many subdivisions. The Rajput tribe alone has about 100 subdivisions, and the Jat tribe has about 200. These tribes and sub-tribes are scattered promiscuously throughout the ten districts and each village has representatives of many sub-tribes within its border. No one tribe, and no one sub-tribe, has a common code. On no one subject are the members of one sub-tribe unanimous. The members of one sub-tribe in one village claim to have a custom relating to adoption, and the members of the same sub-tribe in an adjoining village claim to have a different custom relating to the very same subject. All sub-tribes stoutly maintain that their customs have been handed down from father to son from time immemorial, and that to change any one of these customs would be sacrilege. It might be imagined that the limit of subdivision had been stated, but things had been rapidly becoming worse in the Punjab owing to the absence of any settled code of general principles and to the sanctity attached by the Courts to those immemorial customs. Not only did each body of a sub-tribe claim to have its own customs, but each family insisted that they could regard nothing as law that had not been observed in the history of that family, and ultimately one very experienced revenue officer came in despair to the conclusion that it was a case of "one man, one custom." The task before the Supervisor was, therefore, to collect the raw material, and to put it into shape. He had to

collect " instances of customs " from all these tribes and sub-tribes from every possible quarter. He had then to classify them, and finally he had after close study to ascertain what general principles underlay them, and to report whether these general principles could be reduced to the form of a code which would prove acceptable to the people themselves. It was determined to divide the Punjab into three blocks, central, eastern and western, and deal with each separately. The reason for the adoption of this plan was not only or even principally to make the task more manageable by attacking it in detail. It was adopted in the main because such a division of the province was unavoidable on account of the racial and historical differences between the peoples of these tracts. It is quite unnecessary to enter into detail showing how these differences had arisen. It is sufficient to say that in the eastern block the proximity of Hindustan proper has had a modifying influence on the customs of the people in the direction of Hindu Law, in the western block the preponderance of Mohammedans has influenced custom in the direction of law as laid down by the Prophet, whilst in the centre we have a more or less homogeneous body of tribes who have strenuously opposed both Hindu and Mohammedan law and amongst whom has grown up and flourished a sturdy religion —the religion of the Sikhs—who are no less firmly attached to their hereditary customs than to the teachings of their gurus. It was the central block that was attacked by the Supervisor. It comprises ten of the twenty-nine districts of the province. These districts are Lahore, Amritsar, Gurdaspur, Sialkot, Gujranwala, Sheikhupura, Ferozepore, Jullundur, Ludhiana and Hoshiarpur. The largest tribes are the Rajputs, who profess almost in equal numbers the Hindu and the Mohammedan religions, but are of Hindu stock, the Arians, who are Mohammedans, and the Jats, who are divided into Hindus, Mohammedans and Sikhs. The Arians have no subdivisions, but the Rajputs and Jats are subdivided into hundreds of sub-tribes. Broadly speaking, all these tribes are spread generally over the whole block. Besides these three main tribes, there are scores of others also scattered more or less evenly over the centre of the province.

The Supervisor was spared the trouble of making oral inquiries from all the heads of families of all these tribes and sub-tribes. In fact, his main task was not to acquire information as to customs, but to collect and store the information that had been laboriously acquired during the previous sixty or seventy years,

and that has remained for the most part inaccessible in Government offices and other places.

The material already upon record was fairly ample. It consisted of: (1) the recognized textbooks on Customary Law; (2) the published rulings of the High Court (late Chief Court) and the Financial Commissioners; (3) the unpublished rulings of all the Courts from the lowest to the highest; and (4) the entries in the Revenue Records of each village and in the Riváj-i-'Ám in each *tehsil*.

There are four main textbooks. The first in point of time is Boulnois and Rattigan's *Customary Law in the Punjab*. This was written more than sixty years ago, and is remarkable chiefly for the shrewdness of its dicta concerning the general aspect of customary law as it appeared to a foreign spectator before anything more than a cursory examination of the facts had been made. Boulnois was a member of the first Bench of the newly-created Chief Court, and his knowledge had been acquired mainly from a few years' experience of hearing appeals from subordinate judges. Rattigan was an advocate who had already made his mark as a brilliant student of Comparative Law. He had a large acquaintance with the people, he had an enormous practice in the Chief Court, and he was profoundly learned in the works of ancient and modern jurists. The chief value of their book was that it introduced the reader to the problem of customary law and gave a very just indication of the main principles underlying it.

The second textbook is by far the most famous and has acquired a reputation extending far beyond the confines of the Punjab. It is Rattigan's *Digest of Customary Law in the Punjab*. It is difficult to overestimate the importance of this book. The reader who takes it up now and who reflects that it was written some fifty years ago when the work of examining into Customary Law was in its infancy, is amazed that any man could have so accurately defined the customs prevalent in the Punjab. Each article of the *Digest* contains a concise statement of the law on some particular point, and a close study of all the Chief Court and High Court judgments written since its first publication shows apparently that fifty years ago Sir William Rattigan knew the customs of the province as accurately as they are known now. Unfortunately, this impression is hardly correct. Sir William Rattigan subsequently himself became a Chief Court Judge, and a perusal of the *Punjab Record* (the official depository of the judgments of the Chief Court) shows

that he was a man of such a powerful personality that he imposed his views (which were often doctrinaire) upon his colleagues and successors, and the main reason that his *Digest* now appears to have been an accurate *résumé* of the law is that subsequent judges adopted it as being indeed the true statement of the law governing the people of the Punjab. This is not to belittle the value of the *Digest*. The more one delves into the actual records of custom (of which more will be said presently) the more one finds that Sir William Rattigan had indeed a profound knowledge of it. When all is said and done, there are not many articles in his *Digest* which require alteration. A student who has Rattigan's *Digest* at his finger-tips is well qualified to understand the customs of the Punjab and in nine cases out of ten he will come to a correct decision. At the same time it must be remembered that Sir William had not a universal knowledge of all the customs prevailing in all the tribes. It was impossible that he should have. He knew a great deal, and it was inevitable that he should have come to some general conclusions. He worked on the inductive method, and came to logical conclusions upon the data that he had acquired; but fifty years' patient work by hundreds of revenue officers has added enormously to those data, and it is now certain that some of the conclusions arrived at by Sir William Rattigan require to be altered or at least modified.

The two remaining textbooks—those of Mr. T. P. Ellis (late Legal Remembrancer of the Punjab and a profound student both of law and of history) and of Mr. Kureshi need not detain us long. Mr. Ellis's book is, and professes to be, nothing but a collection of rulings by the judges of the Chief Court. He rarely goes outside the four corners of the *Punjab Record*. It is of priceless value to the practising lawyer, because it tells him at a glance what the judges of the Chief Court have decided. It tells nothing more. Mr. Kureshi's book is of the same sort, but as he is himself a Punjabi he has felt that the Chief Court has not always understood the Punjabi customs and he has not hesitated to say that on certain points the judges are wrong. He has, however, no facts to lay before the reader to justify his assertions. Frequently he argues from the fancied analogies of Hindu and Mohammedan Law, and as will be presently shown there is no reason to think that the Hindu and Mohammedan Codes are a good guide for ascertaining the state of law in the Punjab. His book is suggestive, but his opinions, unsupported by fact, do not carry weight. His

book, however, is of great importance in one respect—namely, that the reader is bound to conclude that however valuable Rattigan's *Digest* is, and however decided may be the judgments of the learned judges of the Chief Court, the last word has not been said about the Customary Law of the Punjab.

The Supervisor had therefore the advantage of a very thorough compilation of the rulings of the judges of the Chief Court. It is useful to inquire how these rulings came to be made. There is a regular judicial hierarchy in the Punjab. An ordinary suit is first heard by a subordinate judge. In his Court the parties who are litigating produce their evidence relating to any alleged custom. According to the Punjab Laws Act, all matters relating to succession, special property of females, adoption, gifts and various other matters of a similar nature must be decided by custom, and it is the duty of the judge to ascertain first whether there is a custom, and, secondly, what that custom is. It is only when he finds definitely that there is no custom extant in the tribe or sub-tribe to which the parties belong that he can fall back on the personal law, *i.e.* generally either Hindu or Mohammedan Law. The subordinate judge, after hearing a great deal of evidence, as a rule finds that there is a custom extant relating to the matter in dispute, and he decides the dispute in accordance therewith. The defeated party may appeal to the district judge, whose decision is final, unless he chooses to grant a certificate that this case is of such a nature that a further appeal ought to be allowed to the High Court. In practice such a certificate is freely granted in cases of custom concerning which there has been no authoritative judicial pronouncement. It follows that the whole body of law relating to custom has been created as a result of the oral evidence produced by interested parties and an examination thereof by these Courts, viz. the subordinate judge, the district judge, and the High Court. It is contained in the seventy volumes of the *Punjab Record* containing the published rulings of the Chief Court (afterwards the High Court) of the last seventy years and in the thousands of unpublished rulings lying buried in the Record Room. The Supervisor and his staff examined not only the whole of these published and unpublished rulings of the Supreme Court but also the rulings during the last fifty years of all the district judges of each of the ten districts. Before discussing the value of this collection of instances in the work of ascertaining what the actual customs of all the tribes and sub-tribes of the block are, it will be convenient to show how the instances

of custom were classified, what was the kind of labour involved, and also what other methods were employed for collecting information.

As regards judicially decided instances of custom, the Supervisor's staff (which for this purpose consisted of three subordinate judges and their clerks) were instructed to write on a card a brief abstract containing (1) the name of the tribe or sub-tribe of the parties, as well as the names of the parties; (2) the nature of the dispute; (3) the final judgment and the date on which it was delivered; (4) the name of the village in which the parties resided. In order to obtain brevity the customs of the block were tabulated under ten main heads with subdivisions. It was found that there were about two hundred and thirty-eight different customs under these ten heads. In order, therefore, to show what the finding in any particular case was, it was sufficient to give the index number of the main heading, the index letter of the subdivision, and the word " pro " or " con " showing that that particular custom had been found to exist or not to exist as the case might be: *e.g.* " I(c) pro " on a card meant that in that particular case it was found that a proprietor could by custom adopt a nephew. The remaining entries on the card showed the sub-tribe, tribe and village of the parties, and the date given made it easy to turn up the judgment itself for purposes of verification. In the central office these cards were triplicated in such a manner that the instance was duly classified as follows: (i) under the heading of tribes; (ii) under the heading of customs; and (iii) under the heading of *tehsils* (a *tehsil* is a subdivision of a district). In this manner if it were required to find out what the customs of any particular tribe or sub-tribe are the collection of instances made under heading (i) was consulted. If it were required to find out which tribes followed any particular custom the collection under heading (ii) could be consulted, while the geographical distribution of customs generally could be ascertained from an examination of the instances under heading (iii). To those who are unfamiliar with the working of a card index system it would be a matter of amazement to discover how this method of tabulation facilitated the inquiry. Day by day the cards kept pouring in from the districts in which the three subordinate judges of the staff were working and the information thus obtained was almost automatically recorded. All that had to be done to produce order out of chaos was to insert the appropriate card in alphabetical series.

Pari passu with the collection and tabulation of these instances of custom culled from judicial records an even more important collection was going on which requires some preliminary explanation. The Punjab is proud of its system of Revenue Records, which is claimed with some justice to be the most perfect system in the world. Not only does an accurate map exist of every inch of ground in each village in which each person's holding is correctly defined, but there are records giving full details of ownership, tenancy, mortgage, easements, and so forth. When a proprietor dies an entry is made in these records showing who the claimants to succession are and who actually succeeded. In case of dispute, the order of the revenue officer who decides it is given in full. At this point it may be noted that the whole question of custom is closely bound up with the occupation of land. When we are dealing with a disputed custom, we are dealing with the succession to land. We may, incidentally, be deciding what are the rules as to adoption, or alienation by a female, or widow re-marriage, or the taking of a son-in-law into residence, but in reality we are determining who is to succeed to the family estate. Hence, these revenue records are of enormous value in the process of ascertaining the actual customs that exist. Here, then, we have a record extending over seventy years, not primarily of disputes, but of what has actually happened in each family in the Punjab on the occasion of the death of an owner of land and what actually happened shows incidentally what are the customs of the people. This is the material that was virtually untouched prior to the appointment of the Supervisor. It is true that in each case in which the dispute was ultimately decided in the Courts, one party or the other or both produced evidence as to what had happened with regard to succession, and this evidence was frequently supported by references to the Revenue Records. But apart from allusions to such in the final judgments, no textbook writer had collected instances from those records with a view to taking a comprehensive survey of the state of custom in the Punjab. The Supervisor determined to tap this source of information freely, and he accordingly deputed two members of his staff, each being an experienced revenue officer, to examine all the Revenue Records of each village in each of the ten districts. Their instructions were to make a note of instances of custom under the ten heads of custom already alluded to, and to prepare cards containing information similar to that contained in the cards prepared by the judicial investigators.

These cards were then triplicated and classified in the way already described. The result of these combined labours was that there is now available for examination a collection of between twenty and thirty thousand separate instances of the actual customs of the people in these ten districts. This number could easily have been quadrupled but that, after a short time, it was discovered that one or two customs were so widespread and so uniform that it was unnecessary to collect instances of them, and the Supervisor then ordered his staff to neglect them.

There was still another method of checking results which was carefully employed. Ever since the advent of the British Raj each district in the Punjab has been overhauled at intervals of twenty years with a double object in view, firstly, to correct the Revenue Records and remove inaccuracies that may have crept in, and, secondly, to revise the rate at which the land revenue payable to the Government should be assessed. This operation takes from three to five years, and the officer in charge takes the opportunity of ascertaining the views of the people themselves as to their customs. At the close of each such " settlement " a book is published containing the answers of various tribes to a set of questions which were originally formulated in order to extract the required information. Of late years Settlement Officers have supported the answers made by giving reference to the Revenue Records or to rulings of the Courts, but, unfortunately, the questions propounded are generally too wide to enable us to use the answers given as a basis of a code. Moreover, it is the experience of settlement officers that the persons who answered the questions (usually the headmen of the villages) had their " axes to grind," and did not scruple to supply answers which would support their own individual claims. The Supervisor, however, made a complete digest of all these district volumes of Customary Law and took them into consideration when writing his report.

It will be seen, then, that apart from the recognized textbooks and the vague books on Customary Law prepared for each district, a mass of detail had been collected upon the " judicial " side and upon what may conveniently be called the " revenue " side. These two collections were kept separate, not only because it was interesting to see how far judicial decisions squared with the actual practice of the people, but because each collection had its own vices and virtues. A few words as to the respective value of these two collections as proving the existence of a particular custom may

not be out of place. The "revenue" instances ought to show what was the actual custom followed without dispute. When a man dies, the village revenue officer makes a note of his death and, on the appearance of the heir, he makes an appropriate note in what is called the Mutation Register. Generally there is no dispute, and the "mutation" entry shows not only what happened but that it happened without any dispute being raised, thus indicating that what happened was in accordance with recognized custom. If there is a dispute, the parties are referred to the Civil Courts. *Prima facie*, therefore, it would appear that these "revenue" instances are of enormous value in showing the existence of certain specified customs in the tribe concerned inasmuch as it is obvious that all parties were satisfied that their customs had been adhered to, whereas in a case decided by litigation there must have been at least one party wholly dissatisfied and still of opinion that the real custom had not been followed. It is the unfortunate truth, however, that we can make no clear inference from isolated cases shown in the mutation register, for the simple reason that that register does not show, as a rule, whether there were any parties interested in contesting the particular mutation concerned; *e.g.* it is of little value to discover a mutation entry showing that a man was succeeded by his daughter's son when we do not know whether there were any collaterals, near or remote, to contest the succession. A realization of this fact might throw us, in despair, on to the second series of instances, viz., those culled from the judicial records. Here at least we might think that we must get at the truth because every detail of the family concerned has been drawn into the light of day. A moment's reflection, however, will show that conclusions based on judicial pronouncements may be even less sound than the former class. A clever lawyer will succeed in blinding the judge to the essential elements of a case; an unscrupulous litigant will suborn equally unscrupulous witnesses to support a false case; and finally a clear-sighted and conscientious judge, dealing with facts that have been honestly elucidated, may be led astray by a logical principle which holds the judicial field for the time being, but which riper learning and experience have proved to be fallacious. As an instance of the last-mentioned possibility of error, attention may be called to the well-known principle, commonly called the agnatic theory, of which more will be said presently. Under the influence of Sir Henry Maine, two such learned judges as Sir Meredith

Plowden and Sir Charles Roe propounded the theory that succession in the Punjab was governed by the severely logical principle that when a proprietor died without male issue the property invariably went to the collaterals who were connected with him by a common ancestor, no matter how far back one had to trace the family line. The judges of the province were, as they thought, in duty bound to observe this principle, with the result that in every case of disputed succession the onus was laid on those who were not agnatic relations to prove that there was a custom favouring themselves. The *onus probandi* thus placed was frequently found incapable of being discharged, the consequence being that, in the lack of evidence, the property went to the agnates, no matter how remotely connected with the propositus.

Thus each series of instances—the "judicial" and the "revenue" —has its own virtues and its own deficiencies, but it would be hasty to conclude that we must reject *in toto* the evidence afforded by them. Just as in the multitude of counsellors there is wisdom, so in the multiplicity of instances we can find a guiding principle. In the first place, taking our "revenue" instances, it is true that it would be unwise and even dangerous to base a conclusion on a single case, when we do not know what the surrounding circumstances were; on the other hand, when we find tens, scores, or even hundreds of instances in which a certain custom was followed by a tribe, *e.g.* the adoption of a daughter's son—even though in not one instance do we know whether there was in existence any collateral interested in opposing it, we may be fairly certain that in that tribe it is a well-recognized principle that a man may adopt his daughter's son. Similarly, a close scrutiny of judicial instances after we have carefully noted the dates on which judgments have been pronounced, and after making due allowance for errors in orientation due to the proximity of the agnatic theory, will often disclose a uniformity of principle.

In order to obtain, therefore, a fairly accurate result with regard to the existence and nature of the customs of the Central Punjab it is necessary to subject the collected instances of custom both on the judicial and the revenue side to a close scrutiny, and to make constant reference to the recorded opinions of the people themselves as contained in the district volumes of Customary Law. The textbooks to which allusion has been made must not be used at this stage; they are chiefly valuable as calling attention to certain conclusions that judges have arrived at. If they agree

with results independently reached, it is well and good; if, on the other hand, they differ, then the present investigator may know that he should devote further attention to the point. There were two other considerations that the Supervisor did not overlook. The first was the history of each tribe, and especially its origin. These may well have had an effect upon the origin and history of a particular custom. Secondly, it was interesting to note how far geographical propinquity had influenced the growth of customs in adjacent tribes.

It is impossible to make a prolonged scrutiny of this nature without noticing several remarkable features. The first is that, taking a broad view of things, there is no very substantial difference between the judicial and revenue instances. This remark requires a little expansion in view of what has been said concerning the mistaken orientation caused by the propounding of the agnatic theory. That theory for about twenty years or so seriously influenced the "judicial" instances. It had not very much direct effect upon the "revenue" side. The temporary aberration on the whole has not affected the ultimate conclusion. There are more variations on the judicial side than on the revenue, but in the long run the results are almost identical. In framing a general code with the idea of making it acceptable to the typical agriculturist one might just as well take as basis the judicial series as the revenue, except that in the latter series a number of customs are shown to exist which are so thoroughly established that they seldom or never come into the Law Courts. As an example may be cited the custom that the mother of an unmarried proprietor succeeds to his estate.

The second noticeable feature is the extraordinary homogeneity of custom throughout the whole block. Each of the main customs which might be formulated in a draft code is exemplified by hundreds of instances in each district, and by tens, scores, or hundreds of instances in the tribes according to their numerical strength. It seems obvious that the principles on which the customs are based are more or less common to all the agricultural tribes of the block. Next, with regard to the fairly numerous exceptions found here and there, it is not possible to trace any *tribal* peculiarities—at least not to any great extent. The variations in customs, that is to say, do not go by tribes. It is very rarely that one is able to say that such and such variation is due to the fact that the family following it belonged to a particular tribe. This statement must be slightly

modified by remarking that the Arians are rather liberal to the individual, while the sub-montane Rajputs are rather conservative; but, on the whole, there is little trace of tribal peculiarities. Similarly, on the whole, it may be said that variations of custom are not peculiar to any one locality; but here, again, a slight modification of statement is necessary. For a general trend of custom in one particular direction is more noticeable in some districts than in others. For instance, the custom of securing succession for a daughter's son by taking a son-in-law into residence (Khánádámádi) is distinctly more prevalent in Gujranwala and Sialkot than in the more southern districts where it is practically unknown; again, in Jullundur, possibly owing to the presence of so many Arians, liberality to daughters is more marked than it is elsewhere. It will presently be seen, however, that these variations are more apparent than real. On the whole, it is a safe conclusion that variations in custom are in a slight degree due to locality and in an even slighter degree due to tribal peculiarity. In short, neither tribe nor locality is the real basic reason for variation. Homogeneity of custom is the rule throughout the block—homogeneity, with a substantial number of exceptions. These exceptions require a good deal of attention. The difficulty of explaining them may be exemplified by two instances taken from one village in the Gurdaspur district. They come not only from the same village and the same sub-tribe, but from the same family. In 1892 a family of Athwals (a sub-tribe of the Jats) on the death of a proprietor made distribution of his property according to the *pagwand* rule, *i.e.* there were sons by two wives, and distribution was made *per capita*—the sons got equal shares. In the very next year, on the death of a proprietor in the same family, distribution was made amongst the sons of two wives *per stirpes*, *i.e.* the *chundawand* system. Now if the sequence of events had been different, *i.e.* if the 1892 distribution had been *chundawand* and the 1893 one *pagwand*, we might have inferred that the Athwal sub-tribe was simply falling into line with its neighbours, because it is common knowledge that there is a general tendency to substitute *pagwand* for *chundawand* throughout the province. But here we have an instance of a retrograde step. Facts such as these lead to the formulation of a striking paradox which becomes more and more evident the closer we examine the mass of material. The paradox is this: the agriculturists of the central block of the Punjab are extraordinarily homogeneous in matters of custom; they are, moreover, in theory

extremely tenacious of their customs, and yet the very large number of exceptions that have been collected shows that they have little or no hesitation in throwing those customs to the winds when occasion arises. At first sight, it would appear, therefore, that the proverbial attachment to tribal custom is a myth, and that no people in the world show such disregard for custom as the Punjab agriculturists. It appears to a superficial observer of the material collected that the thousands of instances are nearly all exceptions to the theoretically established rule of agnatic succession. For it may be remarked *en passant* that practically the whole body of collected instances has to do with agnatic succession, or contradictions of it. We are faced, then, with an apparent paradox; adherence to the agnatic theory, and a host of exceptions now in one form and now in another, but all tending to show that the agnatic theory is a myth. It is submitted that there is no paradox at all, and that a closer study of the material collected by the Supervisor will show firstly that the agnatic theory (though not in the form expressed by Sir Meredith Plowden and his colleagues) is the main guiding principle in matters relating to succession; and, secondly, that in departing from it in so many instances the tribesmen are not guilty of unfaithfulness to their customs.

THE DISALLOWANCE OF PROVINCIAL ACTS IN THE DOMINION OF CANADA.

[*Contributed by* PROFESSOR W. P. M. KENNEDY, M.A., LITT.D.]

THE constitution of Canada differs among other things from that of Australia, in that the Governor-General in Council is given an unqualified power to disallow a provincial statute within a year after assent given by the Lieutenant-Governor of a Province.[1]

It is impossible to decide clearly why the power was granted, and we can only make suggestions. First, Canada began with a strong bias towards a legislative union, and the question of " state rights " was never an issue in the preliminaries of federation. Nor was there any suggestion that the provincial governors should be appointed directly by the Imperial Government. Their appointment lies with the Governor-General in Council, and although they exercise all the functions of the Crown necessary for the self-government of their Provinces,[2] yet they witness to the federal link. It is reasonable to suppose that the federal power of disallowing provincial Acts was intended to correspond in some degree to the imperial power in the federal area, considering that there was to be no direct contact between the Provinces and the Imperial Government. Secondly, it is highly probable that the creators of the Dominion had in view the provision of the American Constitution against unjust and confiscatory legislation by the constituent States. Indeed, Sir George Cartier distinctly stated, during the federation debates in 1864, that the presumption was that the power of disallowance would be exercised in case of unjust or unwise provincial legislation. Whatever the reasons, the fact remains that Canadian federation began with a disposition to look on the provinces as something analogous to municipalities, and provincial legislation

[1] 30 and 31 Victoria, c. 3. ss. 56, 90.

[2] *The Attorney-General of Ontario* v. *Mercer*, 8 App. Cas. 767; *The Liquidators of the Maritime Bank of Canada* v. *The Receiver-General of New Brunswick*, [1892] A.C. 437.

was, for many years after 1867, disallowed not merely as *ultra vires* or unconstitutional—an aspect now usually dealt with by the Courts —but as inequitable, unsound in principle, or destructive of private or contractual rights.

Amid the clash of opinions which gathered round this federal prerogative power, there gradually grew up a theory of constitutional law, based largely on the opinions of the Judicial Committee of the Privy Council. This theory may be shortly summarized: the Provinces have in relation to their subject matter and within their constitutional limits as plenary and ample authority as the Dominion or Imperial Parliament [1]; their status is not municipal, and their legislation within the constitutional provincial ambit is exclusive and supreme [2]; it is absolute.[3] The matter of the abuse of a power is of no importance. Once it is clear that a Province has the constitutional power to legislate in relation to a certain matter then the possibility that the power may be abused cannot be asserted as a reason for limiting the absolute power of the legislation conferred.[4] In other words, within the subjects exclusively assigned to them by the British North America Act of 1867, and conceded by judicial interpretation to belong to them, the Provinces are sovereign. Their legislation, within their sphere, is not open to question in the Courts, because it may be unjust or inequitable, or may interfere with contractual obligations. The power to legislate, like that of the Dominion or Imperial Parliament, may be abused, but "the only remedy is an appeal by those by whom the Legislature is elected." [5]

At this point it is necessary to consider Canadian opinions—judicial and of the federal Government—in connexion with provincial legislation. The period since 1867 can be divided (*a*) 1867–1893, (*b*) 1894–1923. In the former are the judicial opinions of Ramsay J., Strong J. and Draper C.J., which can be summarized in the words of the latter: "The Governor-General is entrusted with authority, to which a corresponding duty attaches, to disallow any

[1] *Hodge* v. *The Queen*, 9 App. Cas. 117.

[2] *Liquidators of the Maritime Bank of Canada* v. *The Receiver-General of New Brunswick*, [1892] A.C. 437.

[3] *Brophy* v. *Attorney-General of Manitoba*, [1895] A.C. 202.

[4] *Attorney-General for Canada* v. *Attorney-General for the Province of Ontario, etc.*, [1898] A.C. 700 (The Fisheries' Case). Cf. *Bank of Toronto* v. *Lambe*, 12 App. Cas. 575.

[5] Lord Herschell in The Fisheries' Case. *Cf.* Chamberlain to the Governor of Newfoundland, December 5, 1898, *Parliamentary Papers*, Cd. 8137.

law contrary to reason, or to natural justice or equity." [1] Strong J., however, as far back as 1878—and the date is worthy of note—while recognizing that this extraordinary federal prerogative power existed unqualified, and could be applied to Acts whose matter was completely *intra vires* the Provinces, saw its delicate nature and the grave difficulties which might arise in the federal Government substituting its opinion for that of a provincial Legislature in a sphere of undenied provincial competency. It might be exposed to the reproach of " threatening the independence of the Province." [2] The reports on provincial legislation can easily be consulted.[3] " Insufficient compensation for the infringement of the rights of property," " flagrant violation of private rights and natural justice," " diminishing the value of franchises already granted," " violation of contracts without compensation," are among some of the reasons which prevailed during these years. Sir John Thompson and the Hon. Edward Blake stand out as exceptions among the federal Ministers of Justice. On one occasion the former, being satisfied that a provincial Act was *intra vires*, refused to consider the justice or injustice of the measure ; on another occasion, while describing the provincial Act in question as pernicious, he refused to interfere because no Dominion interest was at stake—a condition for disallowance, analogous to the imperial power in the federal area, not open to dispute, as providing a quicker remedy for clashes of interests, than judicial review. Once Edward Blake stated that he was not called on to express an opinion on the alleged injustice of a certain provincial Act ; that " was a matter for the local Legislature."

With the consolidation of constitutional theory due to the opinions of the Judicial Committee, we see a new principle at work. From 1894 to 1918 there is an ever-growing catena of authorities from federal Ministers of Justice against the older conceptions. Sir Oliver Mowat laid it down that it was none of his business to review a provincial Act because of injustice. The Hon. David Mills maintained that the federal Government was not responsible for the principles of provincial legislation and that, if remedy for

[1] Ramsay J. in *Angers* v. *Queen Insurance Co.*, 22 L.C.J., and *Corporation of Three Rivers* v. *Sulte*, 5 L.N. ; Strong J. in *Severn* v. *The Queen*, 2 S.C.R. ; Draper C.J. in *Re Goodhue*, 19 Grant. For directly opposed ideas see Casault J. in *Guay* v. *Blanchet*, 5 Q.L.R. (1879).

[2] *Severn* v. *The Queen*, 2 S.C.R. at p. 96.

[3] W. E. Hodgins, *Correspondence and Reports of the Minister of Justice and Orders in Council upon the Subject of Dominion and Provincial Legislation*, 1867–1903.

alleged wrong principles must be sought, it must be with the provincial Legislature or its constitutional judges—the people of the province. The most clear-cut statements of the newer idea were made by the Hon. Senator Sir Allen Aylesworth (Minister of Justice, 1906–11). He declared categorically that the British North America Act did not intend that the power of disallowance should be used to annul provincial legislation, even when the federal Government considered such legislation "unjust or oppressive or in conflict with recognized legal principles, so long as such legislation was within the power of the provincial Legislature to enact it. He was equally emphatic in the House of Commons: "I was not, as advising his Excellency in Council, called upon to think at all of the injustice, of the outrageous character, it might be, of the legislation; but . . . my one inquiry ought to be whether or not there was anything in the legislation which went beyond the power of the provincial Legislature." He went on to declare that he considered the true spirit of the Canadian constitution to lie in placing every provincial Legislature, within the scope of its jurisdiction, upon an absolutely level footing with the Parliament of Canada, and in refusing to allow the federal Government to do a work of disallowance which, if necessary at all, ought to be done by the people who elected the provincial Legislature. He stated strongly that it was not right to relegate to the Ministers of Justice a question which ought to be fought out at the provincial polls.[1]

During these years Sir Allen Aylesworth's ideas prevailed, although his successor in office—the Hon. C. J. Doherty—while refusing to disallow on two occasions for reasons given, stated that he had no doubt that the power could be constitutionally exercised to prevent "irreparable injustice or undue interference with private rights or property through the operation of local statutes *intra vires* of the Legislature." In 1918 he disallowed a British Columbia Act (7 & 8 Geo. V, c. 31) because it diminished substantially the consideration of a contract.[2] This instance did not call for wide comment as the provincial Act in question annulled a contract to which the federal Government was a party. Much more interesting was his repetition of his previously stated conception of the power, and his statement that the system sanctioned in 1867 (quoting the Privy Council without reference) "provides for the federated Provinces a carefully balanced constitution, under

[1] *House of Commons Debates*, (1909) pp. 1750 *ff.*
[2] P.C. (Canada) 1334 (May 30, 1918).

which no one of the parts can make law for itself, except under the general control of the whole acting through the Governor-General." Here Mr. Doherty stopped—I have never been able to decide why—but it is important to give the words of the opinion immediately following: "And the question they have to answer is, whether one body or the other has power to make a given law. If they find that on the due consideration of the Act a legislative power falls within s. 92 [the provincial powers], it would be quite wrong of them to deny its existence because by some possibility it may be abused or may limit the range which otherwise would be open to the Dominion Parliament." [1] The whole opinion does not leave the impression which Mr. Doherty's garbled quotation is liable to give.

The matter has once more been opened up by the disallowance of a Nova Scotia statute (12 Geo. V, c. 177) by the ex-Minister of Justice, Sir Lomer Gouin. The exercise of the federal prerogative gave rise to a whole day's debate in the House of Commons on May 1, 1923, to which I must refer students who may wish to follow the details of a complicated and extraordinary piece of provincial legislation.[2] It is only possible here to reprint the Report of the Minister of Justice and the Minute of Council approving the same [3]; but the Report contains sufficient information on the Act in question to allow some criticism, and it gives the official reasons for disallowance to which I shall return.

CERTIFIED COPY OF A REPORT OF THE COMMITTEE OF THE PRIVY COUNCIL, APPROVED BY THE DEPUTY OF HIS EXCELLENCY THE GOVERNOR-GENERAL ON THE 21ST OCTOBER, 1922

PRIVY COUNCIL, CANADA.

The Committee of the Privy Council have had under consideration the annexed report from the Minister of Justice, dated 17th October, 1922, recommending, for the reasons therein stated, that Chapter 177 of the Statutes of Nova Scotia passed in the twelfth year of His Majesty's Reign, being "An Act to vest certain lands in Victoria County in Jane E. MacNeil," a certified copy of which statute was received by the Secretary of State on the 27th day of October, 1921, be disallowed.

The Committee concur in the views of the Minister of Justice as set out in the said report and advise that the said Act be disallowed accordingly.

The Committee, on the recommendation of the Minister of Justice,

[1] *Bank of Toronto* v. *Lambe*, 12 App. Cas. 575.
[2] House of Commons Debates (1923), pp. 2436 ff.
[3] P.C. (Canada) 2212 (October 21, 1922).

further advise that a copy hereof and of the accompanying report, if approved, be transmitted to the Lieutenant-Governor of Nova Scotia for the information of his Government: also that a copy be transmitted to the petitioners, Plaster Quarries Limited.

All of which is respectfully submitted for approval.

(Sgd.) RODOLPHE BOUDREAU,
Clerk of the Privy Council.

THE HONOURABLE THE SECRETARY OF STATE.

Copy.

DEPARTMENT OF JUSTICE.

OTTAWA,
17th October, 1922.

To his Excellency the Governor-General in Council:

The undersigned has had under consideration Chapter 177 of the Statutes of Nova Scotia passed in the twelfth year of His Majesty's reign, being "An Act to vest certain lands in Victoria County in Jane E. MacNeil," a certified copy of which statute was received by the Secretary of State on the 27th day of October, 1921.

By said Act a certain lot of land known as the "Gypsum Property" in Nova Scotia, being a lot or tract of land situated at Island Point, Boularderie Island, in the county of Victoria, was "vested in Jane E. MacNeil, in fee simple, subject to the same trusts and equities in favor of any other person, persons or body corporate, if any, under which she held the said lot of land on the 10th day of July, 1911, or any prior time, notwithstanding any proceedings or judgment, legal or otherwise, in the Supreme Court of Novia Scotia, or an appeal to the Supreme Court of Canada therefrom, had or taken, and notwithstanding the operation of any statute of limitation in force in this or any other Province of the Dominion of Canada, and notwithstanding laches, if any, on the part of any person, persons or body corporate, if any, claiming a beneficial interest in the said land."

It is further provided by said Act that: "The claims, rights and interests of all persons and bodies corporate in respect to the trusts and equities, if any, mentioned in Section 1 of the Act, shall be for ever barred, unless an action, suit or other proceeding is brought in the Supreme Court of Nova Scotia for the purpose of declaring, enforcing or establishing of such claim, right or interest within one year after the date of the coming into force of this Act."

The undersigned submits herewith a petition dated at Montreal the first day of February, 1922, from Plaster Quarries Limited and the Eastern Trust Company, addressed to your Excellency in Council, praying for the disallowance of the said Act upon the grounds therein set forth.

The circumstances under which the said Act was passed are as follows:

In April 1912, one Frederick W. Sharp, curator and trustee for the creditors of the insolvent estate of Sparrow & MacNeil, a partnership

theretofore carrying on business in the City of Montreal, brought action in the Supreme Court of Nova Scotia against Francis J. MacNeil, a member of the partnership, and Jane E. MacNeil, his sister, for a declaration that a deed of the land in question to Jane E. MacNeil be declared void as against the creditors of the estate, and for a decree rescinding, vacating and cancelling the registry of said deed. The trial judge found that the property was bought with the money of the firm; that the estate was hopelessly insolvent, and he had no doubt that it was insolvent on the date of the deed; that the defendant, Francis J. MacNeil, acted fraudulently towards his firm when he paid the money belonging to the firm and had the deed taken in his sister's name, but that his sister was guilty of no fraud and acted *bona fide* without any knowledge or notice of her co-defendant's fraudulent conduct; that she had no knowledge or notice of the insolvent condition of the firm, and he accepted her evidence that the property was conveyed to her in pursuance of an arrangement which was made between herself and Francis J. MacNeil by which she was to support her junior brothers and sisters in consideration of which he was to buy a farm for her; that she expended under this arrangement $1,500.00 or thereabouts in support of the family, and in addition made their clothes, and that the money she paid and the service she rendered formed an adequate consideration for the conveyance to her of the property.

An appeal was taken by the curator to the Supreme Court of Nova Scotia *en blanc*, which reversed the judgment of the trial judge and gave judgment as follows:

> It is ordered, decreed, declared and adjudged that on or about the 13th day of April, 1911, the now insolvent partnership of Sparrow & MacNeil, of which the plaintiff is curator, intending to purchase from one John McLeod as, and for asset of said partnership, a certain lot of land at Island Point, Nova Scotia, hereinafter more particularly described, delivered unto the defendant, Francis J. MacNeil, the moneys necessary to carry said purchase into effect, but the defendant, Francis J. MacNeil, fraudulently, as against the said partnership and the creditors thereof, having devoted the said moneys of said partnership to the making of said purchase, caused the lands to be conveyed unto the defendant, Jane E. MacNeil, by a certain deed, dated the 18th day of April, 1911, and recorded in Book H.H. page 96, in the Registry of Deeds at Baddeck, Nova Scotia, and said deed as between the said partnership and the said Jane E. MacNeil was voluntary and without consideration and she took the same with knowledge of the premises and fraudulently.

The defendant, Jane E. MacNeil, thereupon appealed to the Supreme Court of Canada, which affirmed the judgment of the Supreme Court of Nova Scotia and dismissed the appeal with costs. The judgment of the

Supreme Court of Canada was given on the 2nd February, A.D. 1915, and on the 13th of July, 1915, the curator sold the property to one Gordon C. Fletcher, who in turn conveyed the same on the 29th of February, 1916, to Plaster Quarries Limited, the present petitioners, who claim that they took possession of the property and that they spent considerable sums of money in improving and developing the same and that in June, 1916, they gave a trust deed to the Eastern Trust Company securing an issue of bonds of the par value of $150,000.00, of which $27,500.00 worth have been issued, paid for in full, and are held by the public.

Some four years later Stanley MacNeil, the younger brother of Francis J. MacNeil, upon his return from service Overseas, commenced an agitation with a view to having the case reopened, and in the result induced the Legislature of Nova Scotia to pass the Act now in question.

Upon the request of Stanley MacNeil a hearing of the parties was had before the undersigned, at which Stanley MacNeil appeared in person, and the petitioners were represented by counsel. Communication was also had with the Attorney-General of Nova Scotia, and in reply the undersigned was informed by the Deputy Attorney-General that the Act referred to was not introduced as a Government measure, and that in the present case the Government of Nova Scotia would not oppose the disallowance of the Act if the case be regarded as an exceptional one and not as a precedent.

Upon careful consideration of the record in the case of *Sharp* v. *MacNeil* and of the material filed and representations made by both parties at the hearing, the undersigned is unable to escape the conclusion that the Act in question is so extraordinary and so opposed to principles of right and justice that it clearly falls within the category of legislation with respect to which it has been customary to invoke the power of disallowance.

It has been the subject of judicial declaration by the Courts, that while the Provinces have the right to legislate upon the subjects committed to their legislative authority, power to disallow any such legislation is conferred by the same constitutional instrument upon the Governor in Council, and that incident to the power is the duty to execute it in proper cases. In the exercise of that duty the undersigned is convinced that your Excellency should not leave to its operation an Act of the kind now in question, which, so far as the undersigned is aware, is without parallel in the history of Dominion or Provincial legislation. Its purpose and effect is to take away from private persons property and rights acquired by them upon the strength of the judgment of the highest Court in Canada, in affirmation of the judgment of the highest Court of the Province, and vest the property in one who by the judgment of said Courts originally had no right or title thereto.

Whatever may be said with regard to the title of Jane E. MacNeil, it appears that the present petitioners and the bondholders acquired the property and rights above referred to *bona fide* and for valuable consideration, and the undersigned is not aware of any circumstances what-

ever, moral, equitable or legal, which can be pointed to in justification of the legislation now under review.

The provision of the Act with regard to the preservation of certain trusts and equities is of doubtful interpretation and effect, and forms no amelioration of the act of the Legislature in making a statutory conveyance of the property from the rightful owners to Jane E. MacNeil. Whatever may be said on one side or the other, the fact remains that the Legislature, in passing the Act in question, constituted itself a court of appeal from the Supreme Court of Canada, thereby removing the case from the judicial tribunals expressly established for the administration of justice in the Province, and the undersigned is convinced that in such case the Act should not be left to its operation.

The undersigned therefore has the honour to recommend that the said statute, chapter 177 of the Statutes of Nova Scotia passed in the twelfth year of his Majesty's reign, being " An act to vest certain lands in Victoria County in Jane E. MacNeil," be disallowed, and that a copy of this report, if approved, be transmitted to the Lieutenant-Governor of Nova Scotia for the information of his Government ; also that a copy be transmitted to the petitioners, Plaster Quarries Limited.

Humbly submitted,

(signed) LOMER GOUIN,

Minister of Justice.

The Minister of Justice does not hint in his Official Report that he considered the legislation unconstitutional or *ultra vires*, nor did he do so in the subsequent parliamentary debates. Indeed his speech was confined almost exclusively to the extraordinary nature of the statute. Those who opposed the action of the federal Government spoke to the following resolution :

> In the opinion of this House the disallowance of the statute enacted by the Legislature of the Province of Nova Scotia . . . was an abuse of the Dominion's powers of disallowance, such statutes being entirely *intra vires* of the Province, and not interfering with any matter the subject of Dominion policy or administration.

Their challenge that the statute was *intra vires* was not denied, and as a consequence they dwelt strongly on the status of the Provinces as developed by the Judicial Committee of the Privy Council. In addition, stress was laid on the fact that the federal prerogative power of disallowance was linked with a similar imperial power in the federal area by the British North America Act of 1867, and that as there had been a shedding of control in the latter sphere, there ought to be an analogous process in the former. In other

words, that the provinces had outgrown along with the Dominion the rigidity of the Act. Their arguments in this connexion might have been strengthened by the fact that the Imperial Government had refused to disallow two Queensland Acts passed in 1920, to which objections had been taken, that they repudiated contractual obligations entered into under the *bona fides* of previous legislation. Strong protests were made, and the Governor appears to have neglected his instructions to reserve Bills of such a nature. In neither case did the Imperial Government take action, and thus an impression is left that even in the matter of statutes *prima facie* confiscatory the imperial power of disallowance is obsolete. Stress was laid by those who supported the disallowance on the fact that the statute annulled a judgment of the Supreme Court of Canada—years after it had been handed down—on the faith of which moneys had been invested. Two interesting facts also emerged during the debates. The Nova Scotia Legislature attempted to repeal the Act at the request of the federal department of Justice, but the repealing Bill did not get beyond second reading, owing to the closing of the session. The Nova Scotia Government apparently made no attempt to put it through, as they could easily have done with their strong majority, had they so desired. Secondly, the Nova Scotia Government declared that they were unconcerned if the Act were repealed provided it were not drawn into a precedent, and the Premier of Canada seemed to think that this fact was an important item in the situation. Finally, in connexion with the debates, it is important to notice a change in outlook. It cannot be said in the future, as was said with much truth in the past, that disallowance is a Conservative policy and non-interference a Liberal policy. The Leader of the Conservative Opposition spoke in terms reminiscent of former Liberal Ministers of Justice, while the Government supporters borrowed shafts from the quiver of Conservative régimes.

It lies outside this article to submit the incident to minute criticism. The details belong to the domestic policy of Canada, and beyond a doubt Sir Allen Aylesworth's *dictum* applies if necessary : it is a question to be fought out at the polls. On the other hand, the student of constitutional law may be allowed to make some general remarks without rude trespass across the delicate frontiers of Dominion life. There are points which need at least stating, if not examining, as they open up interesting fields in constitutional theory, practice, and interpretation, which transcend territorial limits. I wish then, in conclusion, to make some general

observations, while at the same time I wish to guard myself against giving the impression that I am criticizing the matter under discussion from the point of view of party politics in Canada. In itself and in its implications, it is of sufficient importance to interest jurists outside Canada.

The first question which presents itself is this, if it be granted that this Nova Scotia Act was *intra vires* of the Province, and if it be granted that the Canadian Provinces are absolute and sovereign within their ambit, as the Privy Council has declared, then a serious situation arises if the federal Government assumes the rôle of moral censor of legislation undoubtedly constitutional. In other words, if the federal Government, through the Minister of Justice—and "from the decision of the Minister of Justice there is no appeal; he stands alone" [1]—will disallow provincial legislation, admittedly *intra vires*, on the grounds of injustice or of its extraordinary or confiscatory nature; it is hard to see how the Provinces can fulfil their functions as laid down by the Judicial Committee or find security in their organized life. Provincial responsible government must assume something of a farcical nature if its constitutional legislation can be annulled by a foreign body, owing no responsibility to the people of the Province and from whose decision there is no appeal. Sir Lomer Gouin clearly makes "extraordinary" Acts "opposed to principles of right and justice" subject to disallowance. He quotes in this connexion a Canadian judicial opinion—"It has been the subject . . . in proper cases"—as old as 1873. It is well to note that he did not inform the Governor-General in Council of the many opposing *dicta*, not only of the British and Canadian judiciary, but of his own predecessors in office.

Secondly, he advances a theory of constitutional law unknown to British jurisprudence, and advanced, I think, for the first time in relation to the federal prerogative power: "Whatever may be said on one side or the other, the fact remains that the Legislature, in passing the Act in question, constituted itself a court of appeal from the Supreme Court of Canada, thereby removing the case from the judicial tribunals expressly established for the administration of justice in the Province." This statement of his Report may be placed side by side with his statement in the House of Commons: "This Supreme Court . . . created under the provision of Clause 101 of the British North America Act . . . Parliament provided

[1] See a protest in these terms from the Government of British Columbia, August 22, 1905.

for such a Court, and, by implied interpretation, provided at the same time that its judgments should not be affected by provincial legislation." [1] It may be conceded at once that the Act is extraordinary, unsound, even oppressive. It may be conceded at once that it is dangerous to pass an Act overriding a judgment, and that many years on, on the faith of which moneys have been invested. But surely Sir Lomer Gouin's opinion goes too far. I have failed to trace his interpretation of the Acts governing and creating the Supreme Court, and I have never come across such a statement previously. Surely the federal Government of Canada cannot create by federal Act a Court whose judgments lie outside review by a provincial Legislature acting within its legislative competency? No provincial Legislature would pass an Act revoking a judgment of the Supreme Court dealing with the resolution of the question of the distribution and constitutional allocation of legislative powers. Sir Lomer does not mean that. He apparently means that if a judgment of the Supreme Court is handed down in a field undoubtedly provincial then, by "implied interpretation" of the function of the Supreme Court, a provincial Legislature ought not to touch that judgment. I refuse to believe that that is Canadian constitutional law. If the Province is supreme within its ambit no Court can stand above its electors. Again, the general statement of the Report is entirely opposed to our constitutional practice. If a Parliament sovereign within its sphere calls in question the judgment of a Court, and repeals or revokes it by constitutional legislation, must its Acts be called in question and disallowed? This savours of American jurisprudence. Doubtless the Nova Scotia Act might weaken the financial security of the Province, or bring its good faith into question, as the two Queensland Acts immediately did in relation to a Queensland loan on the English market; but it seems to me it is possible to make only two replies: (1) the ancient one of *Caveat emptor*, or (2) that given by Mr. Justice Riddell in the Florence Mining case: "The Legislature within its jurisdiction can do everything which is not naturally impossible, and is restrained by no rule, human or divine. The prohibition 'Thou shalt not steal' has no legal force upon the sovereign body, and there would be no necessity for compensation to be given." [2] I cannot believe that this objection to the Act in question deserves serious consideration.

[1] House of Commons Debates (1923), pp. 2448–9.

[2] *Florence Mining Co.* v. *The Cobalt Lake Mining Co.*, [1909] 18 O.L.R. 257.

Thirdly, the Government of Nova Scotia had apparently assumed a position of distinct danger to the other Provinces and to the whole structure of Canadian federation. It recently had an Act passed changing the rule of the road, and then, by agreement with the federal Government, had the Act disallowed. That is to say, it used the federal prerogative power to get done what its own Legislature ought, if convinced, to have done. There is just the appearance of evil here—a provincial Government using the federal Government to defeat the purposes of the provincial Legislature. In the present case it says, "We do not care if you disallow, provided you do not make a precedent of it." Surely this is the very nadir of responsible cabinet government. It would form a nice point in law to argue that the Dominion Government has no right to disallow by request. However that may be, if a Government is responsible to the provincial Legislature, is it good constitutional practice to go behind that Legislature, either to get its Acts disallowed, or to treat proposed disallowance as a matter of indifference? It may be that Novia Scotia seeks to change its constitution in that direction. That is a point which would also form a nice argument. The main issue, however, is that this attitude may prove most detrimental to the federation as a whole.

Doubtless, the matter is not over. We may have a demand that the power of disallowance be abolished similar to that made at the Inter-provincial Conference at Quebec in 1887.[1] That, of course, opens up the whole question of the Canadian Constitution, and provincial agreement would require support from addresses in the Dominion Parliament before the Imperial Cabinet would act. There is no difficulty over the constitutional question of *intra vires* and *ultra vires*—the Courts can deal with those. The problem arises with the recrudescence of disallowance in relation to Acts of provincial competence, which the federal Government may dislike and disallow on their judgment of equity, unsound principles and such-like. Professor Keith has suggested that between the Imperial Government and such Dominions and States as the Imperial Government technically controls in possessing the constitutional power of disallowance, Acts of such a nature ought to be submitted to arbitration—if the Imperial Government considered that a *prima facie* case of injustice was made out and *vice versa*. He sees no other means in the long run to resolve the issues now that equality of

[1] Biggar, *Sir Oliver Mowat*, ii, 507.

status is recognized within the Empire.[1] It seems to me that this is the only solution in Canada, now that the Judicial Committee has established the equality of the federal and provincial Legislatures. A panel of judges could easily be set up ; and Canadians have such a justifiable trust in the Canadian judiciary that the few cases necessary for arbitration could be best settled in that way. One thing appears clear: it is impossible to go on having one Government disallowing the constitutional Acts of an equal Government without one of two results happening: the Governments will cease to be equal ; or provincial defiance may follow paths pointed out by Manitoba, some thirty years ago, in its educational crises, to the weakening of the whole fabric of the Canadian nation.

[1] *The Times*, May 27, June 2 and 9, 1920.

THE CODIFICATION OF POLISH LAW.

[*Contributed by* PROFESSOR DR. STANISLAS GOLAB, *Dean of the Faculty of Law in the University of Cracow, Member of the Codifying Commission of the Polish Republic.*]

Introductory Notes.—Two great tasks in the sphere of law-making have lain before the reborn Poland. The first and most obvious was the establishment of homogeneous laws throughout the reunited country. With this object in view, the Codifying Commission of the Polish Republic was appointed in 1919 ; it is composed of the foremost legal experts in the country, chiefly Professors of Law in the Universities, and judges and lawyers of long experience.

In the provinces of civil law and civil procedure the necessity for codification was most urgent. Civil law naturally penetrates into every recess of that powerful and yet subtle organism, so frequently explained and yet so mysterious, which we call the State. The task is no less difficult in the matter of procedure : the Law Courts in the entire Republic have to be reorganized ; they have to be uniform in the whole country, and a uniform procedure must be established for litigation before them. How abnormal, and even dangerous, would be the prolonged continuance of a state of affairs under which in some provinces German civil procedure is still enforced, in others Russian or Austrian!

The second aim of Polish codification is the necessity of establishing a specifically *Polish* system of law. This may be accomplished if the codification, without discarding the generally accepted principles of law and the consideration of needs and demands of the present day, will at the same time lay the foundation for the development of Polish jurisprudence in the future. Polish codification cannot merely represent the result of a comparative study of foreign systems. During the first years of her new existence Poland naturally had to be content with statutes drafted *ad hoc*, to satisfy day-to-day legislative needs.

Civil Law.—The Civil Committee of the Codifying Commission decided in the early stages of their work (November 1919) to draft a national Polish Civil Code. Similarly the Congress of Polish Lawyers held at Warsaw in May 1920 recommended that a Civil Code for Poland should be drafted independently of any of the existing Codes, though, of course, embodying generally recognized principles of civil legislation. This recommendation was passed after many other proposals had been carefully

considered. There was a proposal that the Polish Civil Code should be based on a "synthesis" of the principles and achievements of foreign Codes. It was also proposed that the French *Code Napoléon* (including the Civil Code of the Kingdom of Poland, 1825) should be universally adopted in the form in which it is still binding in former Russian Poland. These proposals were rejected, and the discussion showed that the Conference did not think it advisable to enforce without any reservations whatsoever a legal system of one province of Poland in the remainder. It is true that the power of habit is great and that people will always work better with something to which they are accustomed already, than with something foreign, even though the latter may be more useful and better. But if the system must be changed it is essential that the new one should not be foreign, but our own, created by and suitable for ourselves. Hence it is unnecessary to be afraid of a new and original Code so long, of course, as it is consistent with other vital needs of the people.

The labours in connexion with the Polish Civil Code are proceeding slowly, mainly for two reasons. First, because the Civil Committee of the Commission has had to deal largely with statutes of minor but pressing and immediate importance. Secondly, work of this kind must not be unduly accelerated. Besides, none of the experts has been able to devote himself entirely to the work. However, in spite of these handicaps several parts of the Code have now been drafted. Amongst the *projets* published are those of Law of Property at Marriage, Law of Coercion, Error, Fraud, Responsibility for Statements, Compensation over and above Statutory Damages, and also some parts of the Law of Inheritance. None of them, however, has yet passed the trial of discussion and final sanction in Plenary Commission.

In the province of Law of Marriage some of the controversial points have already been discussed. The main question was whether the principle of "option" in contracting a marriage should be established, *i.e.* that marriages should be legal if contracted either before the proper minister of religion or a lay registrar. Connected with this is the question of "registration," *i.e.* the entering of each marriage into the registrar's books; furthermore, should the failure to register the marriage infringe the validity of the contract or involve only fines for contravention of statute? And who is to be responsible for the performance of this formality—the minister of religion or the civil authority to whom the officiating minister should report each case of marriage?

Related to these is also the question of legalizing divorces. Divorces—at least in Roman Catholic marriages—can either be excluded entirely or, alternatively, may be allowed within certain legal boundaries. Admitting the latter alternative, we may exclude divorce by mutual consent of the parties and restrict it only to causes specified in the statute such as: adultery, mental or infectious disease, persistent cruelty or commission of a capital offence. Next must be considered which authority

should legalize the divorce. This depends entirely on the extent to which ecclesiastical jurisdiction will be allowed to deal with the Law of Marriage. Admitting the principle of "option"—the question may be solved in such a way that Church marriages would fall within the province of Canon Law, civil marriages falling, of course, within the jurisdiction of Civil Courts. But even in cases of Church marriages where facts such as specified in the statute occur—the granting of divorce would be permissible to Civil Courts. This concerns mainly Catholic marriages, as in other denominations divorces are granted by the Church itself.

In the Law of Property at Marriage the two conflicting principles would be, on the one hand that of common property of husband and wife, and, on the other, that of separate property with a nominal obligation on the part of the wife to contribute towards the family's expenses. Conflicting with the first aspect is the principle of entrusting the husband alone with decisions as to financial matters and those concerning the future of the children. A compromise on this doctrine is not impossible: mutual consent might be required, or—should this be impracticable—the decision may be left to the Law Courts or (in the first instance) to the Family Council or guardians. The leaving of the decision invariably in the hands of the husband is not desirable, especially in a decision affecting a daughter, nor can it be left entirely to the wife. Of course, both husband and wife would be at liberty to settle their property as "common matrimonial property" under certain clearly defined conditions.

These are the most important questions of the Law of Matrimony. For various reasons they have not been settled so far, nor has a complete *projet* been drafted. This is due partly to the unsettled question of a Concordat with the Holy See in accordance with Article 114 of the Constitution. Negotiations for the conclusion of such a Concordat are in progress. As regards the Law of Inheritance, provisions have so far been drafted for cases of intestacy.

It has been mentioned above that the Civil Section has finally drafted several statutes. The more important are: the draft Statutes on the Applications of Private International and Interprovincial Law. Their main object is to eliminate the numerous conflicts of various civil codes in international and interprovincial (internal) relations; and to define clearly the province in which each particular civil legislation should be operative. Private legal dealings arising out of family relations, questions of inheritance, contracts, etc., may arise with parties who are outside the boundaries of Poland. Poles enter into contractual obligations with foreigners, they contract marriages abroad, consequently it is possible that in certain cases conflicts may occur between the Polish and foreign Civil Codes, and it would have to be determined which of the conflicting codes should be applied to the case in question. But within the boundaries of Poland there are not less than five different legislations in the province of private law, containing various, often obsolete, provisions for settling these conflicts of law, viz.: the law of the former Russian

Poland, and Austrian, German, Russian, and (partly) Hungarian laws. The question, then, arises which of the provisions should be applied for settling conflicts with foreign systems of law; this being vital not only because of the foreign States entering into treaty relations with us, but also for our own citizens who are entitled to unified regulations in this respect.

On the other hand, it must be clearly pointed out which of the five systems operative in Poland should be applied to litigation between citizens of different provinces. Similarly, if international law will provide for a question to be settled in accordance with Polish Law, we must know beforehand which of the five systems is to be applied. Parliament has not yet dealt with the *projets* of the Codifying Commission which were placed at the disposal of the Chamber so far back as 1921. It may be added that these *projets* were most favourably reported on by legal experts of all countries.

The Civil Law Committee of the Codifying Commission has also dealt with the Law of Copyright. As a result of its deliberations a *projet* of the Law of Copyright has been dratted, and some parts of it already published.

The nature of copyright is a controversial matter, and the attempt to discuss it here would necessarily involve academic discussion. It is a well-known fact that before the protection of an author's rights was established "literary thefts" occurred frequently and exploitation of authors by unfair publishers was a fact of everyday occurrence. At the present moment conditions have greatly improved: we have the International Berne Convention of 1908 (1914), subscribed to by Poland in 1920. But some of the provincial Copyright Acts are still in force in Poland—Austrian (1895), German (1901, 1907, 1910) and Russian (1912) —and consequently authors' rights, which should be the same for the whole country, vary according to provinces; hence many conflicts and litigation. The extreme importance of a unified Copyright Law was emphasized by the Authors' Conference in 1920.

The *object* of the Law of Copyright is any expression of spiritual activities, being the author's own original work—as soon as it is permanently embodied in any shape, such as word of mouth, writing, printing, painting, sculpture, rhythm, etc. The *projet* worked out by the Commission prescribes the duration of copyright (during the author's natural life and fifty years thereafter), the possibility of transferring it to other persons, and deals also with other agreements concerning agency, circulation, further editions, etc. Contraventions of the law in this respect and punishment thereof are also embodied in the *projet*.

The literary community demanded that, in case of non-existence or expiration of copyright, control should automatically be vested in the Literary Academy or the Academy of Science. All works of Polish classical literature would thus belong for ever to one of these bodies. The Committee, however, rejected the authors' proposals and adopted the method of collecting a fee for the publication of works the copyright of

which has expired. The revenue thus collected would be entirely contributed to the needs of literary and art institutions, as is the case in France and Italy (*domaine public payant*).

It must be admitted that the achievements of the Civil Section of the Commission have been considerable, when the circumstances in which the work on this most intricate part of law was performed are taken into account. Such works as *Introduction to the Polish Civil Code* and the *Modern Civil Code* tend to overcome the difficulties arising from the manifold legal systems still operating in Polish territory—systems all of which are foreign and not adapted to the needs and conditions of the country. In Czecho-Slovakia attempts are made only to improve the Austrian Civil Code, but in Poland such a course would be impossible.

The Civil Law Committee has recently published the General Section (with elaborate comments) of a Code of Obligations.

Civil Procedure.—In 1917 and 1918 special Commissions were set up in Warsaw and Cracow which have already finally prepared *The Outlines of Polish Civil Procedure,* as also a volume of *Polish Civil Procedure.* These are not yet in the shape of an articled code, but they contain valuable theses with commentaries which may serve as a basis for the Code of Civil Procedure. The work in connexion with this began immediately after the establishment of the Codifying Commission, and various parts of the proposed Code have been distributed amongst members of the Civil Procedure Committee. In this way a voluminous work was produced in 1921 under the heading of *Polish Civil Procedure—projets* with Commentaries—embracing the whole of legal procedure in the Courts of First Instance and outlining general principles of procedure, such as the determining of the territorial jurisdiction of Courts and of the value of the object of litigation, costs of action, facilities for poor litigants, etc. The *projet* tends in the main to shortening the course of procedure as much as it is possible to do so without harmful effects on the subject-matter of the civil process. Upon the basis of the French system combined with the achievements of German legal science, there has been compiled a draft superior to many of the latest codes of other countries.

The second volume of the *projet,* which is to be published shortly, deals with appeals and extraordinary trials. Appeals, cassation (reversal of judgment) and revision of trial are the statutory means by which a judgment may be annulled or revised. The question of Appeal is perhaps the most difficult problem of the Law of Procedure, requiring decision in many controversial and intricate questions in which it is necessary to choose between many solutions. It is sufficient to mention one problem only: cassation or revision of trial—*i.e.* should the French or the German system, or a combination of both, be adopted? Is the Supreme Court to limit itself only to the cassation of the verdict of the Second Instance, which one of the parties questions, and refer the case back to the Lower Courts for retrial, or may the Supreme Court itself try the case and modify the judgment? It is to be expected that the

majority of the Codifying Commission will favour the cassation rather than the retrial.

The Commission laid down in 1920 the principles of judicial organization of Civil and Criminal Courts. The main outlines are as follows: The Courts of First Instance are County and Divisional Courts. One judge, or a justice of the peace elected in accordance with Article 76 of the Constitution by the population, would sit in a County Court. In Divisional Courts acting as Courts of First Instance one judge would sit as a rule, but in cases of greater importance—greater not by reason of the value of the object of litigation but on account of the nature of the case—there would be trial by a tribunal of three judges. The Courts of Second Instance are: Divisional Courts dealing with Appeals from Divisional Courts acting as Courts of First Instance. Three judges will sit in all Appeal Courts. Lastly: there is the Supreme Court, composed, as a rule, of five judges.

The representative element in civil jurisdiction is introduced by the election of justices of the peace, and also by the admission of the expert element into Commercial Courts. Where these are acting as Courts of First Instance the Bench would be composed of one expert and two judges. Both civil and criminal appeals are to be tried by the same Courts. In the province of Penal Procedure trial by jury is to be established (this was passed by the Plenary Commission contrary to the recommendation of the Criminal Law Committee). The organization of Criminal Courts is based on the principle of two tribunals with one Supreme Court for the Republic which tried only cases of statutory offences. The Minister of Justice is also the Attorney-General. For the conduct of examination, judges (*juges d'instruction*) attached to Divisional Courts are selected from experienced justices of these Courts.

It may not be out of place to add here that the Constitution adopted the following principles as regards the Judicature: 1. The administration of justice is performed by judges. 2. Separate statutes are to determine the organization and procedure to be adopted by Law Courts. 3. Judges are appointed by the President of the Republic, exceptionally—in the case of justices of the peace they are elected by the population. 4. Judges are independent in their verdicts, and they cannot be dismissed or transferred to another office; they also, like members of legislative bodies, enjoy the privilege of freedom from arrest, unless it be revoked by the Court. 5. The standing of judges is different from that of other civil servants, and shall be determined by statute. 6. The Courts may challenge the legality of the Government's decisions; they may not, however, dispute the legality of an Act passed by Parliament; thus, an Act may be inconsistent with the Constitution, yet the Courts will be obliged to enforce it.

A *projet* of the whole of the Polish Civil Procedure, together with commentaries, has been published—a voluminous work of the greatest importance to the State. Some amendments will probably be made by

the editorial committee so as to co-ordinate the work of particular *rapporteurs*. Perhaps the final *projet* will not be placed before Parliament until a later date, but this may be regarded as a fact of little importance if one considers that the whole subject has been thoroughly dealt with.

The Procedure Committee has also dealt with *projets* in connexion with other statutes, such as Enforcement of Judgment, Bankruptcy Law, Procedure in Undisputed Cases, etc.

Commercial Law and Bills of Exchange Acts.—The most important and tangible result of the work on these questions, so vital for the economic welfare of the country, is the publication by the Civil Department of a Bills of Exchange Act. Without prejudice to the real value of the work—which required a great deal of expert knowledge and also the realization of the economic situation in Poland—it must be admitted that this task was considerably easier, mainly because of The Hague Conference of 1910, which resulted in an International Convention regulating the various questions connected with bills of exchange, etc. This Convention deals not only with bills payable abroad but also regulates the question internally for those States which subscribed to it, *i.e.* most of the countries of the world, with the notable exceptions of Great Britain and the United States.

This "*Convention sur l'Unification du Droit Relatif à la Lettre de Change et au Billet à Ordre*" has so far—mainly because of the War—had very little or no application at all. At the present moment the League of Nations is undertaking the work of unification, applying, amongst others, to Poland for co-operation in the revision of the existing text. The Codifying Commission was requested to report on the desirability of amendments to The Hague Convention. The report of the Commission on this subject contends that the work of the unification of the rules governing the law of bills of exchange was based heretofore on the adoption of the French and German systems with a possible combination of the two. The main difference between the systems is that, whereas in Germany strict formalism prevails, irrespective of the actual conditions or relations between the parties and based exclusively on the personal credit of the signee, in France the system, taking these conditions and relations into consideration, gives the creditor a security and a guarantee of the satisfaction of his claims in addition to the contractual obligation on the part of the debtor arising from his signature on the bill. In this way credit is based on actual relations, the law guaranteeing the results which both parties have intended to attain.

Both these systems are binding in Poland—the German one in the shape of German, Austrian (and Russian) Bills of Exchange Acts and the French one embodied in the *Code de Commerce* of former Russian Poland; as a consequence of this situation and The Hague Convention it was practically impossible to choose any other way than the combination of the two systems. In view of the international character of the

evolution of the Bill of Exchange Law, this was the best (if not the only) way out of the difficulty. But The Hague Convention is far from settling every point; there are matters still open for discussion, either because it was impossible to reach a common agreement on them, or because they were connected too closely with the various legal systems in operation in each country. In these matters the initiative was left separately to each particular State, and independent Polish provisions are to figure in the Annex to the Convention.

The Bill of Exchange Act will be chronologically the first Code of modern Poland.

The Commercial Law Committee in 1920 discussed a paper on the position of agents (brokers) and carriers; it advocated a statute concerning warehouses as a part of the Commercial Code. Recently proposals for laws governing exclusive rights, such as patents, protection of models and trade marks, and for a law of cheques, have been placed before the Committee.

Penal Law.—The Penal Committee of the Commission had to undertake the creation of an independent and original Polish Penal Code; or the compilation of a code combining the various Codes operating in Poland; or the recognition of one of those Codes as operative throughout the whole Republic. As a preliminary step to undertaking the first there was submitted a *questionnaire* on all the general problems which should be settled before the drafting of the Code would begin. The *questionnaire* contained a long list of problems, some of which it may be useful to mention here.

The first question to be decided was whether or no the *projet* was to contain only offences usually provided for by Penal Codes, or should it also embrace those dealt with by additional penal statutes, and further should an administrative Code be established? Further, the *questionnaire* dealt with the classification of penal offences, *i.e.* were they to be classified into crimes and delicts (misdemeanours), or should a third class—contraventions—be added, or should there be, in the manner of the Japanese Code of 1907, no classification at all? Apart from these technical problems, further questions of principle arose, viz., was the Polish Penal Code to have a purely subjective character, or should it also take into account the impression the offence produced on the general public? Further, how many varieties of guilt should be distinguished, and in particular, whether, in addition to intentional and unintentional crimes, the "realization of crime" by the wrongdoer should be taken into consideration? Lastly, the questions of attempted crime and aiding and abetting. As regards penal sanctions, naturally the question of capital punishment as well as that of the various forms of imprisonment (first, second and third divisions) commanded serious attention.

Three voluminous instalments of a periodical published by the Codifying Commission have been devoted to its labours in the field of Penal Law. They contain minutes of the deliberations on the *question-*

naire, and also those of the other *questionnaire* dealing with capital offences and bodily harm in addition to many other questions. It is impossible to consider all of these here, but a few words may be said about the attitude of the Criminal Law Committee towards these general principles. It held that the Polish Penal Code should embrace all offences, including those usually provided for by additional penal statutes, but discarded the idea of a special administrative (police) statute. Thus, no punishment can be inflicted except under the provisions of the Code. Further—before the question of the threefold (French) system of division of offences into crimes, delicts and contraventions as compared with the twofold division into crimes and contraventions, was settled—attention was drawn to the different attitude adopted in this matter by the old Polish Law and also by the Polish Penal Code of 1818. After having considered the pros and cons of the problem, it was decided to adopt provisionally the threefold division. The principle was formulated as follows: "Offences, on account of the degree of ill-motive of the offender, of the danger to the State and public they create, of the value of goods against which they are intended, of the amount of mischief (harm) they have actually caused and of the punishment provided for by law—shall be divided into Crimes, Misdemeanours (including Torts) and Contraventions."

Later, however, a resolution was passed that offences against the welfare of the State, of the public or of the individual are to be divided into Crimes and Misdemeanours.

Besides offences prosecuted by the State, the Polish Penal Code will also recognize such offences as may be prosecuted on private initiative. In torts the question of bringing an action would lie entirely with the injured party, whereas in offences prosecuted by the State at the request of an individual the plaintiff, though having the right to institute proceedings, would not in principle have the right to withdraw the charge. This is intended particularly for offences the prosecution of which, though important to the general public, is not instituted by the State, only because the publicity given to the case might possibly do still more harm to the injured individual. The action in tort is applied mostly in cases of defamation, whereas the prosecution on private initiative is intended for cases of adultery, breach of promise of marriage, etc. It was decided that the permission to withdraw the charge by the individual who instituted the proceedings may be granted only in exceptional cases prescribed by statute. Another kind of prosecution was introduced if a public offence such as theft or fraud was committed by relatives of the victim; in this case proceedings would be taken only at the request of the latter, though the nature of these offences is public, not private.

The question whether the wrongdoer should be held liable only for the intended consequences of his offence or for all consequences of his deed, even though he did not or could not possibly foresee them, presents one of the greatest difficulties of Penal Law. The modern view limits

the responsibility to consequences which the wrongdoer actually has, or ought to have, foreseen ("natural and probable" consequences in the English Law of Torts). The conflict between "subjectiveness" and "objectiveness" in Penal Law has been settled by the Committee in favour of the former (*i.e.* the person and not the crime should be punished), but the wrongdoer will be responsible for all natural and probable consequences of his deed.

It follows from the subjective principle that the offender may be punished only when he is positively guilty. In the interest of the offender, therefore, it must be determined by the Code in what circumstances the guilt will justify the punishment. This question might be settled by the judge in each particular case, but there are many weighty arguments against thrusting such a burden upon his shoulders. The guilt may be intentional (by ill-motive) or unintentional by carelessness, mistake or negligence. In the first case the offender desires to commit the offence as a result of his wrongful act; thus stress is laid on the will (intention) of the offender, which is instrumental in committing the crime. But there may be a third form of guilt, viz., when the wrongdoer, although contemplating a certain consequence as the result of his malfeasance, yet realizes at the same time that his act may also produce other consequences. Thus, a person will commit a crime intentionally if he either desires the criminal consequence of his deed or fully realizes the possibility of it (*i.e.* conditional ill-motive). These degrees of guilt were adopted by the Criminal Committee, recommending at the same time that the distinction between intentional and unintentional crime should be made in the Code and also that provision should be made for the third case, *i.e.* when the offender acquiesces in the probable result of his malfeasance. Other forms of guilt aggravating the offence, such as premeditation and malice, will not be recognized by the Code.

Apart from the difficult and controversial definition of attempted crime the principle of liability was unanimously accepted; and all attempts to commit crimes will be punished though not so severely as the consummated offence.

By a majority of one vote (6 to 5 against) the Criminal Committee has decided to establish capital punishment, though with the application of broad principles of reprieve, *i.e.* the privilege of the Courts to substitute for the death sentence another penalty in cases where there are some non-legal facts "justifying" the crime. Only two degrees of deprivation of liberty have been adopted, viz., penal servitude and ordinary imprisonment, the first as punishment for felony, the second for misdemeanours. Penal servitude would involve hard labour, prison garb and prison rations, solitary confinement, etc., whereas ordinary imprisonment involves little inconvenience beyond mere detention (in English Law since 1898 for "offenders of the first division"). Although the distinction between solitary confinement ("third division") and ordinary prison is one which is so vividly drawn in popular imagination,

yet it has not been recognized by the Committee, for after such hardships as handcuffs, whipping and branding had been abolished, there would be little difference between the two. In old days criminals who had committed grave offences were detained in basements (*in fundo*), whereas petty offences were punished by detention in a tower; nowadays a prisoner can only be subjected to harder discipline or worse food, or deprived of the choice of work. Further, it has been decided to reject the cell system, *i.e.* the permanent and absolute isolation of the prisoner, as also the special imprisonment " in fortress " for political offences.

In view of the division of offences into two groups (Crimes and Misdemeanours) the judges will not be able, even in special circumstances, to choose between the two forms of deprivation of liberty, *i.e.* penal servitude and detention. On the other hand, an alternative penal sanction was introduced by the possibility of substituting fines for imprisonment; thus for certain offences (not felony) either punishment may be resorted to.

Fines were adopted as a punishment and may also be imposed in addition to imprisonment, especially for offences where pecuniary benefit was the motive of crime.

In inflicting punishments, the Code will provide for the widest possible liberty of Courts. Under the Statute, the Courts will have complete power to remit punishments in exceptional cases even below the minimum fixed by the Code.

The spirit of our times is expressed in the evolution of the institution of Pardon. The doubtful and delicate question of investing judges themselves with the power of pardon has not been settled by the Commission, as no decision could be arrived at. So the question remains settled by Article 47 of the Constitution, which vests in the President amongst other prerogatives, that of Pardon and that of remitting sentences in certain cases.

The consequences of a judicial verdict according to the adopted resolutions cannot be automatic. In principle the Court may inflict " additional punishment," *i.e.* acting on the statutory provisions it may deprive the offender of certain rights or privileges. The deprivation of actually acquired rights is permanent, whereas the deprivation of the capacity of acquiring them in the future can be made for a period of time between the *minimum* and *maximum* prescribed by statute. The circumstances in which this additional punishment may be inflicted are particularly base motives of the offence. In special cases it is even the duty of the Court to inflict this additional punishment, especially in cases where the crime proves the wrongdoer's base character and mean motives, such as in the cases of traffic in women, traffic in slaves, etc., or for offences of an outrageous and anti-social character. For the author of such offences must be prevented from holding office and even be deprived of the capacity of acquiring it.

The conditions of deprivation of civil rights and the various forms of additional punishments will be prescribed by the Code. The distinctive

forms of these are: disfranchisement or forfeiture of honorary privileges, such as distinctions, orders, etc. Furthermore, the offender may be deprived of his paternal or professional privileges. Additional punishment cannot, however, be inflicted in cases where the offender has been sentenced to ordinary imprisonment or to pecuniary fines. The forfeited rights or the capacity of acquiring them may be recovered by way of "judicial rehabilitation." The Court may not grant this before at least half of the period during which deprivation of rights was to apply has elapsed, and in no case before two full years have passed. After a certain longer period after the principal sentence has been served, the offence is automatically erased from the "penal register," provided, of course, that the offender has not committed another offence in the meantime. The erasion from the register entirely annuls any moral effects of the sentence.

Finally, respite was recommended by the Committee. The Court may postpone the delivery of their judgment, or, after delivering it, may postpone its execution, and subsequently quash the sentence should the "probation" be successful. The probation is unsuccessful and the respite revoked if within the period of probation (2–5 years) the offender evades the supervision instituted over him or commits another offence, or is charged with misbehaviour, breach of the peace, etc. Respite may apply to sentences both of imprisonment and of fines; to penal servitude only in exceptional cases, provided the term of the sentence does not exceed two years.

Besides penal sanctions the Polish Penal Code will also recognize preventive sanctions. This is meant to protect the public against certain criminals as well as against the repetition of crimes. In old days capital punishment served this purpose, as well as other sanctions, such as: expulsion, deportation or mutilation, castration, branding, etc. In modern legislation other measures are used, such as prolongation of the term of imprisonment (in Norway) or detaining a recidivist criminal in special preventive institutions. In the Polish Criminal Code preventive detention has been adopted for habitual and professional criminals, as well as for partly insane offenders, inebriates, etc. These would be detained respectively in asylums, workhouses, etc.

The Criminal Committee further discussed the question of Insanity. After hearing evidence of medical experts on the influence of mental diseases or aberrations on commission of crime, the methods of determining the influence of insanity on the commission of the crime were discussed. The method adopted by the Committee is a combination of the psychological and medical methods, and consists in the first place in determining the degree of insanity (*e.g.* mental disease, temporary insane delusions, disturbance of mental functions, etc.) and in the subsequent consideration that in the circumstances the offender could not realize the gravity of the crime, or, being aware of its gravity, could not avert the commission of it. For offences where the power of realization of crime

or of the possibility of avoiding it was only temporarily reduced a remitted sentence may be applied, as well as preventive sanctions in special cases. Thus the principle was established that although such persons are not absolutely immune, yet they should be treated with clemency, for they acted in a state of partial cloudiness of mind or impotence of will. The problem of "determinism" and "indeterminism" in crime was not considered, for this is a question with which a statute need not and should not concern itself. A Penal Code dealing with the impotence of averting criminal acts considers it only in so far as it is limited to a discrepancy between a man's act and his realization of the nature of this act. It is known that offences are often committed in a hypnotic state, when the subject commits the offence, although he realizes the harmfulness or even the illegality of his act. In this case his malfeasance will not amount to a criminal offence.

The Polish Penal Code will apply to all persons who commit offences within the boundaries of the Republic, and also to offences committed on Polish warships and other vessels as well as on airships wherever these may be. A crime committed on Polish territory, though the result of the crime might have been intended for another country, is punishable by Polish Law. It has also jurisdiction over Polish citizens committing penal offences abroad, should proceedings against them be taken in Poland. Offenders naturalized in Poland after the commission of crime and even foreigners may be prosecuted for offences committed abroad against the welfare of the Republic or generally against Polish citizens.

The vital condition under which a Pole or a foreigner can be prosecuted in Poland for offences committed abroad is that his act should also constitute an offence under the legislation of the country where it has been committed. Apart, however, from foreign legislation, acts of treason committed by Polish citizens abroad are punishable. Further, the principle of legal protection against offences of an international character, although committed outside the State, was adopted, though no obligation is imposed on the State to prosecute such offences. This principle, based on the community of interests of all States in dealing with the plague of grave offences of an international character, permits or even imposes the duty to prosecute them though they were committed abroad. This embraces such offences as slave traffic, traffic in women, forgery of coins, bank-notes and other public securities, piracy, unlawful use of explosives, etc.

On the basis of the discussion and of resolutions passed a preliminary *projet* of the General Part of the Criminal Code consisting of 92 Articles was drafted. Chapter XII (Articles 74–80) is entitled, "Proceedings against Minors," and forms a separate part of the *projet* of Legislation for Minors. This *projet* is based on the principle that criminal proceedings cannot be instituted against certain persons for whom Reformatory Institutions are provided instead. These persons are: criminal offenders under thirteen, and those between thirteen and seventeen if they have

committed the offence without realizing its nature, *i.e.* before having attained such mental and moral development as would enable them to realize the nature and consequences of the offence committed. Reformatory measures will also be applied to minors under seventeen who, though not guilty of any grave penal offence, are found begging, loitering for felonious purposes, or generally misbehaving themselves. These measures include: return to parents with a warning that they will be held responsible for negligence or lack of supervision should the minor commit a penal offence; further, entrusting the minor to a responsible person or to a charitable institution; lastly, confining the offender to a private or State-owned institution.

If a minor between the ages of thirteen and seventeen commits a crime with realization of its nature, he would be detained in a Reformatory unless the offence is of such character as would permit the application of a milder form of warning. And even a minor actually sentenced to confinement in a Reformatory may be put on probation for a certain period of time, after which the Court may either quash or uphold the sentence according to the offender's behaviour. The reprieve, however, may not be granted in cases where the minor committed an offence usually punished by death or imprisonment for life. The Court will also determine the *minimum* and *maximum* period of detention in a Reformatory (in no case shorter than six months or longer than ten years). The release of the convict after the *minimum* and before the *maximum* periods prescribed by the Courts have elapsed will depend on the recommendation of the Directors of the Reformatory. But even before the minimum period is over the Court may, on recommendation from the Directors, release the convict conditionally, and place him under the supervision of a Guardian (Court Missionary); again, if the convict is found guilty of breach of the peace, he will be sent back to the Reformatory, but, should his conduct be satisfactory, he will be released.

The draft statute provides also for special Homes for minors and for supervision over them; the management of the Hostels will be conducted by private (charitable) societies who would nominate guardians of minors and generally look after the welfare of their wards, giving them legal assistance and carrying out the decisions of the Courts.

The *projet* is based on the modern tendency to combat criminality amongst minors by educational and reformatory methods.

The Penal Procedure Committee of the Commission has worked out a complete *projet* of Polish Criminal Procedure which is now the subject of further consideration.

Bibliography.—The official literature of Polish Codification began during the war, with *projets* of Polish Civil Procedure, published in two parts in Warsaw in 1917 and 1918 in the Polish *Civil and Penal Law Quarterly*, and a report of Cracow University experts on the same subject, published in the Cracow *Legal and Economic Journal* in 1918.

The Codifying Commission in the new Poland has for its official organ

a journal called by its own name (*Komisja Kodyfikacyjna*). Of this, eight instalments, devoted partly to general matters and partly to Penal Law in particular, had appeared from 1920 to the end of 1922. Besides, detailed minutes of the proceedings of the Civil Law Section on the question of international and interprovincial private law, and on the Copyright Law, were published in the Cracow *Legal and Economic Journal* in 1920 and 1921. The outlines of the organization of Polish Courts of Law for civil matters, as worked out by the Commission, appeared in the official *Journal of the Polish Ministry of Justice* in 1920. The *projets* of Civil Procedure, prepared by different experts in the Commission, were published in the Cracow *Legal and Economic Journal*, and reprinted in two volumes in 1921 and 1923. The definite *projets* concerning international and interprovincial Private Law were published in Polish, French, and German at Cracow in 1921 and 1922. The *projet* of a law organizing special tribunals for minors was published in French and in Polish in Warsaw in 1921. The *projet* of the Copyright Law appeared in the Cracow *Legal and Economic Journal* in 1922, and has been reprinted in a separate volume. A preliminary *Questionnaire* concerning the Law of Mortgages was published in 1920. Finally, a definite *projet* of the Law on Bills of Exchange appeared in 1923.

Apart from these official publications, a voluminous literature of studies and contributions by individual Polish legal experts has grown up round the work of the Codifying Commission during the last four years in the shape of articles in Polish legal periodicals, as well as separate books and collections of materials. The names of the principal University Professors and members of the legal profession who have taken part in this discussion (most of them also themselves members of the Codifying Commission) are: M. Allerhand, J. Dziurzynski, X. Fierich, A. Górski, W. L. Jaworski, H. Konic, E. Krzymuski, J. L. Litauer, J. Lyskowski, J. Makarewicz, V. Mankowski, A. Parczewski, E. S. Rappaport, M. Rostworowski, J. Skapski, E. Till, S. Wróblewski, F. Zoll, and the writer of the present article.

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THE NEW RUMANIAN CONSTITUTION.

[*Contributed by* D. MITRANY, ESQ.]

Introduction.—In the spring of 1923 the Rumanian Chamber and Senate adopted a new Constitution. The change was needed in order to enact, with relative finality, the great land and franchise reforms; and also to bring the newly acquired provinces—Transylvania, Bucovina, Bessarabia—under a unified legislative system.

Rumania's first Constitution dated from 1866, when the country, just emerged from a national revolution, consolidated her virtual independence by electing Prince Carol of Hohenzollern to be the ruler. Turkey still retained certain nominal suzerain rights until the Berlin Congress of 1878, but that legal fiction in no way affected the tenor of the Constitution of 1866, nor the changes which it suffered in 1879 and in 1884. The change of 1879 merely affected Article 7, which concerned the status of the foreign, and especially of the Jewish, inhabitants of the country, giving force to those clauses of the Treaty of Berlin which required that if the great Powers were to recognize Rumania's independence, the religious bar should disappear from her legislation.

In 1884, Articles 58 to 63 were so altered as to transform, for the Chamber, the existing four-class franchise into a three-class franchise, and Articles 68 to 72 so as to change in a similar spirit the two-class franchise for the Senate. In both cases the preponderant influence of the landlords was modified by the introduction of electors belonging to the budding middle class.

No other changes took place till 1917. In that year, under the pressure of events, the Rumanian Government and Parliament, then in refuge at Jassy, passed the constitutional principles of the right of the peasants to the land, and of universal suffrage. The definite enactment of these principles was left to the Act which forms the subject of this article.

Rumania's Constitutional History.—If, therefore, one leaves aside the minor changes of 1884, it will be seen that the milestones of Rumania's constitutional history were marked by one revolution and two wars. A constitutional history which is linked up with such political somersaults needs to be related, if its nature is to be made clear, to its background of circumstance even more than if it were allied to a continuous political evolution. Hence, a few words on the conditions which prevailed at the birth of the first Rumanian Constitution and its successors are indispensable.

In the seventies, when the first Act was evolved, the Rumanian people had just emerged from centuries of subjection to the Sultans, and later, and rather less, to the Tsars. Liberation had only been secured through revolution. Hence, among them, the longing for freedom was as present as the practice of freedom had been absent ; and, like the man who comes into an unexpected heritage, they would not have felt secure in their hold on their new happy state unless it was confirmed by a legal deed. They wanted a written Constitution ; and, of course, they wanted the most attractive Constitution that had so far blossomed in the experimental nations of Western Europe. The foreign Prince was expected any moment. No one knew what kind of man he was. Obviously, it was best to put the new political liberty into safe keeping. Two of the more radical leaders set to work and within twenty-four hours produced a slightly adapted translation of the Belgian Constitution. The special Assembly then sitting made the draft its own, unanimously proclaiming it there and then to be the fundamental law of Rumania. That was at a time when Rumania was hemmed in between the semi-autocratic Empire of the Habsburgs, the wholly autocratic Empire of the Tsars, and the tyrannic rule of the Sultans in the Balkans ; and when, of the Rumanians themselves, only a handful knew the first principles of representative government. Yet, in certain respects, and for obvious reasons, the Rumanian Constitution of 1866 went even beyond its model. Whereas the Belgian Constitution said that the executive power " belonged " to the King, Article 35 (now Article 39) of the Rumanian adaptation spoke of the executive power as being " entrusted " to the King. Again, while the model allowed certain powers to be given to the King by means of an ordinary law, Article 96 (now Article 91) of the copy laid it down that " the King has no other powers than those which the Constitution gives him."

To the new bureaucratic middle class the Constitution was a useful cloak to show off on parade ; but for everyday work its stiff folds were much too embarrassing, and for fifty years they let it hang in its glass-case while riding the country in homely breeches and spurs. The fundamental law, which a few idealist Radicals had been able to press through in a moment of feverish excitement and uncertainty, was as thoroughly divorced from what the ruling classes were willing to grant as from what the illiterate peasantry was able to claim and enforce. Hence, whatever political fighting took place in the fifty years that followed lacked the steadying ring of accepted custom or law. It was rather in the nature of a violent tumble in a political vacuum, bred by undefined discontent and ending in uncertain settlements.

M. Iorga, the Rumanian historian, was, therefore, perfectly justified in arguing that from 1866 to 1917 Rumania has in fact had no Constitution. That argument is proved by the curious fate of the written Rumanian Constitution in undergoing all its significant changes under the pressure of outside forces. The religious bar was removed in 1879

in compliance with a decision of the Congress of Berlin ; and the emancipation of the Jewish inhabitants of the country has only now been completed, and as a result of the war settlement (Art. 133). More striking is the link between cause and effect in the case of the recent franchise and land reforms. Rumania had been able to keep up for fifty years a three-class franchise (with the peasants having only one vote in the third class among fifty of them) with little or no audible outcry, and the sudden change from it to universal franchise must have surprised the outsider, because it came, to all appearances, through a free parliamentary vote. Altogether different circumstances surrounded the land question, yet they led to a similar consummation. Half a century of seething discontent and a series of violent risings passed by without visible effect on land tenure and the status of the peasantry. But, after the two Russian revolutions, the Rumanian Parliament, then in refuge at Jassy, hurried in 1917 through the reform which transformed overnight a country of immense *latifundia* into a country of peasant freeholds.

It should be mentioned that the ruling Rumanian politicians strongly deny that the great reforms of 1917 had any foundation other than their political wisdom and goodwill. They point out that, in principle, the expropriation of the large estates in favour of the peasants had been taken up by them as a point of practical policy after the second Balkan War of 1913. That is so ; it is also true that when one says that the Russian revolutions were the real dynamic force behind the Rumanian reforms, one is stating things too simply because one must state them briefly. But the general justice of the statement is confirmed by the subtle reactionary alchemy to which the reforms have been subjected between 1917 and 1923.

In 1917 the Rumanian Government, which was presided over then, as now, by M. Bratianu, adopted only the principles of the great constitutional reforms. The Parliament at Jassy was only a temporary Parliament, and, as half of the country was in enemy occupation and could not be consulted, the Government very properly argued that the final enactment of the reforms should be left to a fresh Assembly representing all the sections of the nation. Yet the plain sense of the principles which were then adopted, as well as the atmosphere in which they were passed, fixed beyond manner of doubt the radical purpose of the reform : the land was to go to the peasants, while the political power was to be everybody's in an equal degree. That purpose would have appeared with telling definiteness in the detailed arrangements if these had been passed in 1917, or even soon after the end of the war. But, for a number of reasons, which we need not discuss here, the passing of the new Constitution was delayed until the spring of 1923. In what manner does the final Act fulfil the promises made in exile in 1917 ?

Land and Franchise Reform.—As the constitutional changes are dominated by the land and franchise reforms, it will be convenient, in order to illustrate the character of the new Constitution, to deal first

with those clauses which refer to property and to the machinery of popular representation.

According to the terms of the old Constitution, land could only be expropriated for the making of roads, of works of defence, and for reasons of public health. In 1917, the principle of wholesale expropriation of the large estates was adopted, against compensation, for the establishment of peasant free-holds. At the same time a limit was fixed to the amount of land which any man may hold in Rumania. The details of the reform had to be enacted in a series of laws ; their essential provisions are now confirmed by Art. 131, which formally declares them to be henceforward an integral part of the new Constitution. This agrarian reform has by no means satisfied the peasants ; it is being attacked at every opportunity by the Peasant Party, which since the war has been the strongest party in Opposition. Art. 17, therefore, has put an obstacle to further expropriation for the benefit of the peasants by requiring for it " laws adopted by a two-thirds majority." There are in the statement (hereinafter referred to as the Report) submitted to the Chamber by its Rapporteur some suggestive comments bearing on that restriction. As an apology for the many vague clauses of the new Constitution the Report says that—

> If the old constituent had left the ordinary legislator free to consider other cases that may have arisen, instead of laying it down that expropriation was permissible only in three defined cases, we should have had neither 1907 [which saw the most serious peasant rising in Rumania] nor another revolution, which would fatally have followed but for the outbreak of the war of 1913. . . . Similarly, if the Constitution of 1917, under Conservative pressure, instead of fixing the number of hectares, had left the ordinary legislator free to study and determine the exact surface available, we should not have had to face at a certain moment the question : Constitution or revolution ? . . .

Certain people had again demanded that the purposes for which expropriation was permissible should be specified. This could not be done ; but in order " to give to the right of property one guarantee more than exists in other legislations," the " two-thirds majority rule " was introduced for general purposes of expropriation. " That is the maximum protection that could be given."

This anxious Conservatism is in striking contrast with another provision in matters of property. Art. 19 plunges with revolutionary suddenness into State Socialism, by decreeing that—

> Mineral deposits as well as all wealth of the subsoil are the property of the State. . . . A special law will determine the manner in which these materials are to be exploited, and will fix the royalties of the owners of the surface, as well as whether, and in what measure, they may participate in the exploitation of that wealth.

Existing concessions may be tolerated for a period not exceeding fifty years. The Report attempts a lengthy and confused justification of that measure on grounds of principle, as well as of similarity with foreign laws. It argues that the "natural right of property" is the result of a legal creation, by the widening of the notion of property. Hence, most countries, which the Report enumerates, have limited in one way or another the right to the ownership of minerals. Russia, it is interesting to note, is taken as a prominent example.

Only in England do we find the right of accession in force. But Englishmen, too, have realized the great national and social drawbacks resulting from that system, and they have tried lately to nationalize the mines; but have been prevented by the enormous compensations that would have had to be granted. To-day it is too late, and they are very sorry about it.

The Rumanian legislator, more cautious, is doing the thing "at a moment when it is easy, thereby avoiding the possibility of reaching a time when we could only establish the fact that it is too late." But what is his purpose? It is not "socialization," for the Government has stated that it has no intention whatever of running the mines, etc., as a State service; nor can it be "nationalization" in a political sense, for in Rumania land could not, and cannot, be owned by foreigners. The critics, and especially the peasant critics, of the new Constitution denounce the measure as an insidious attempt to deprive the peasants of much of the benefits they derived from the reform of 1917. No one could take away the land from them; but the new Constitution, they say, goes as far as it dare by making it difficult for them to obtain more land while robbing them of all the wealth that may be hidden beneath the surface of their new holdings.

The accusation that the new Constitution represents an attempt to get back some of the reforms which had to be granted in 1917 could certainly be substantiated from those Articles which deal with popular representation. In 1917, as I have already mentioned, the Jassy Parliament adopted "universal, direct, equal and compulsory franchise with proportional representation." Art. 64 of the new Constitution replaces "proportional" by "minority" representation; what kind of a minority is meant remains to be defined, along with other things, by a special electoral law. The women's vote is gently barred by means of a contrivance which we have met already. The Report says that strong arguments had been adduced in favour of the women's vote; its possibility has been admitted by those who drafted the Constitution, but, on grounds of expediency, "it has been left to the ordinary legislator to choose the opportune moment, without hampering him with provisions which, in the absence of par. 2, might prevent him from taking that step." Now, what par. 2 of Art. 6 says is "that special laws, passed by a majority of two-thirds, shall define the conditions under which women may exercise

political rights." As the Constitution proclaims the complete civic equality of the two sexes, it is clear that the writer of the Report has been the victim of a strange logical lapse when he suggested that by prescribing a two-thirds instead of an ordinary majority they have facilitated the advent of the women's franchise.

The hedging skill of the draughtsman is particularly noticeable in the section dealing with the composition and powers of the second Chamber. Of the new Constitutions adopted in Europe since the war, only the Serbian is based on a single Chamber. But while the German, the Austrian, the Czech and the Polish Constitutions have all adopted second Chambers, those have in every case, though in a varying degree, been subordinated to the popularly elected first Chambers. More original, the Rumanian system first allows the Senate equal legislative powers with the Chamber; and, in the second place, it selects the membership of the Senate on lines which are not to be found in any other legislature. The Senate is to be composed of elected members and of members sitting by right (Art. 67). The first group is subdivided into (*a*) members elected directly by all Rumanian citizens of forty years and more (Art. 68), and (*b*) members elected by various bodies. One member for each county (*judetz*) will be elected by the respective county and district councils voting together, on the French and Belgian models (Art. 69). The Chambers of Commerce, the Chambers of Industry, the Agricultural Chambers will be grouped in special constituencies (of which there must not be more than six), and each category will elect from its members one Senator for the Constituency (Art. 70). Finally, the Professors of each University elect one Senator to represent them (Art. 71). The Senators by right are in their turn subdivided into (*a*) Senators who sit because, and so long as, they fill a certain function, and (*b*) Senators who sit for life in virtue of some past function. The first group includes the Primates; the Bishops of the Rumanian Orthodox and of the Uniate Churches; the heads of other religious groups which are recognized and number at least 200,000 adherents; and the President of the Rumanian Academy (Art. 72). Article 73 gives the following list of Senators for life: former Prime Ministers who have occupied that high position for at least four years, and former Ministers who have altogether held office for at least six years; former Speakers of the two Houses of Parliament who have presided over at least eight ordinary sessions; former Deputies and Senators who have been elected to at least ten Parliaments; former Presidents of the Court of Cassation (the highest Rumanian Court of Appeal) who have acted in that capacity for at least five years; the Presidents of the National Assemblies which proclaimed the Union with Rumania at Chisinev, Czernovitz and Alba-Julia; the generals, retired or of the reserve, who have commanded an army at the front for at least three months, and those (not more than four) who have in peace time held office as army commanders or Chiefs of the General Staff for at least four years. That is a formidable gathering of professional vested

interests. The innovation is not without interest; it is as good an attempt as any other to justify the use of a second Chamber. What, however, concerns us here is to estimate its effect on Rumanian political life. The Senate, in general, exercises exceptional power by standing, in legislative matters, on an equal footing with the Chamber. The next question is, how the forces are distributed within the Senate itself. There is as yet no data available to show which of the elected or of the titular elements will predominate. But two significant aspects of the Rumanian scheme are perfectly obvious. In the first place, it is clear that, for at least one generation, assuming the normal rotation of parties in power, the new Rumanian provinces, as well as the new peasant electorate, will have no candidates qualified to sit as life-Senators by right.

A somewhat remarkable provision is contained in Art. 108, concerning the organization of the elected local authorities. The County and District Councils are to be elected in the ordinary way, by universal suffrage. In addition, the original draft gave Parliament the right to introduce into these Councils co-opted members and members by right, up to one-fifth of the total membership. In the revised text that proportion became as one to four; the final Act has altogether done away with any such restriction. Apparently it would now be legal for any Parliament to nominate the bulk of the representative bodies.

Passing reference might be made also to a minor legislative novelty. Article 76 sets up a Legislative Council, which is to help in the drafting of bills and of regulations for the enforcement of laws. The Council will have merely a consultative capacity, but all bills, with the exception of budgets, must be submitted to it for opinion. A special law will determine the composition and working of the Council.

Constitutional Guarantees.—We may now consider in brief how the Rumanian Act deals with those constitutional guarantees which are the bedrock of a fundamental law. Almost all the relevant clauses have suffered some change. The trend of these changes has recently been subjected to a searching analysis by Professor Constantin Stere in the Rumanian Chamber. He devoted his speech to those sections of the Constitution which concern individual liberty, and his closely argued conclusion was that with regard both to principle as well as to machinery the individual citizen is left more helpless in the face of any abuse of authority than he was before the reform.

Art. 13 of the old Constitution declared that—

> Individual liberty is guaranteed. . . . No one may be arrested or detained without a warrant, except in case of seen guilt;

that is, unless caught in the very act of committing some punishable offence. Professor Stere was able to quote the draftsman of the original bill as saying, in a confidential Report, that—

We maintain the text of the present Art. 13. But, as in practice it is continually violated by police arrests, . . . we add a provision destined to prevent abusive encroachments on individual liberty. Without this new provision . . . . the guarantee of individual liberty is incomplete.

Unfortunately, that well-meant addition never saw the parliamentary light. Article 11 of the new Constitution merely repeats Art. 13 of the old. With one serious exception: the expression "seen guilt" has been modified to "obvious guilt."

"In that manner," says Professor Stere, "an objective, concrete criterion has been changed into a subjective criterion. What is 'obvious'? . . . The Middle Ages looked upon witchery and upon relations with the devil as obvious."

Thus the unfortunate private individual is left at the mercy of the executive agent who may *think*, as well as of the agent who may *pretend*, that he is "obviously" guilty of some crime. What redress has he against wrongful arrest? Art. 31 of the new Constitution says that the executive agents who have abused their power may be pursued in accordance with the Penal Code; while the Penal Code says that an executive agent is not responsible for an abuse committed by order, but that responsibility rests altogether with the superior authority which may have issued the order. In political cases, especially, that hierarchical search for the guilty would as often as not end in the Minister's office, and Ministers could only be prosecuted after a decision of Parliament, taken by a majority of two-thirds (Art. 98). And further, according to the last paragraph of Art. 107, "the judicial power has no authority to judge acts of government, or orders of a military character." But are not all the measures of the executive authority, whether good or bad, whether legally proper or not, acts of government? A well-known authority, Professor Barthélemy, insists that so-called "acts of government" are either in conformity with the law, and then there is nothing to distinguish them from ordinary administrative measures, or they are against the law, and then there is no judicial principle by which they could be justified. Having examined the cases in which the doctrine of "acts of government" was invoked in defence of official actions, M. Barthélemy concludes that "it is nothing but an arbitrary distinction, destined to excuse arbitrary measures." That Napoleonic invention has now found its way into the new Rumanian Constitution; and the vista of a possible riot of arbitrariness which it opens up is alarmingly enlarged by the second par. of Art. 128, which says that "in case of danger to the State, martial law, partial or general, may be established by means of a bill." Nothing else is said that might in any way define or limit what shall constitute a "danger to the State."

To all appearances, the only remaining obstacle to legalized lawlessness is the principle of ministerial responsibility. As we have already

seen, a Minister could only be prosecuted in pursuance of a decision of either Chamber, taken with a majority of two-thirds. Art. 98 maintains this principle, but whereas the old Constitution provided that the prosecution should be conducted by the Assembly which ordered the impeachment, this task has now been transferred to the Public Prosecutor. But the Public Prosecutor is an official directly dependent on the Minister of Justice—that is, on a colleague of the impeached Minister. The new Constitution has further dropped the clause according to which a sentenced Minister could not be reprieved, except at the request of the Chamber which had impeached him.

There remains only the category of juridical guarantees, as expressed in the organization and authority of Justice. The relevant section of the new Constitution has suffered the most damaging criticism of all because it came from no less a person than the head of the Rumanian Judiciary. In his address at the opening of the new law year, last autumn, the first President of the Court of Cassation, M. Manolescu-Romniceanu, expressed in public the hope that the special law which is to elaborate the respective clauses of the new Constitution will never come into existence. He disclosed the fact that his Court had requested the Government to inscribe in the Constitution, in unambiguous language, the principle that a judge may not be removed from his post. Art. 104 leaves this to be done by a special law, which, says M. Romniceanu, " may give to that principle such a meaning as to make it useless as a genuine guarantee for the judges." And, in the best of cases, cannot one law undo what another has done? Constitutional guarantees " were especially necessary in our country, where laws are changed with extreme facility."

Very instructive are the changes made in the organization of Justice. The old Constitution said that " the juridical power is exercised by the Courts and Tribunals." Art. 40 of the new Act declares instead that " the juridical power is exercised by its organs." What organs? Only the regular Courts of Justice? Not altogether, for to the plain statement of the old Constitution, that " extraordinary commissions and Tribunals cannot be created under any name and for any reason," Art. 101 of the new Constitution adds, as a running test, " for the purpose of any specific criminal or civil cases, or for the trial of any definite individuals." If these two changes are considered together, it is clear that under the new Constitution special Tribunals may not be set up in Rumania for dealing with a definite case or a definite individual, but that special Tribunals may at any time be created and empowered to judge certain types or categories of cases.

Such a wholesale tampering with the scales of Justice gives a disturbing significance to another change, with which we must close this examination of detail. Art. 26 maintains the general principle that Press delicts are to be tried by jury. But it introduces the exception that libel cases, etc., " against private individuals or any public official,

affecting their private life or their personal honour," are to go before the ordinary Courts.

General Character.—This cursory analysis of the main changes introduced by the new Rumanian Constitution leaves no room for doubt as to its general character. It is not so much the result of, as a retort to, a revolution. For the rest, it fulfils tolerably well the first point and with a vengeance the second point of the Napoleonic dictum that "a good Constitution must be short and vague." The whole document consists of not more than 138 terse articles, but an excessive number of its main principles are left to be defined and elaborated by subsequent special laws. The most serious omission is the absence of any provision concerning the control of the country's foreign relations and the making of treaties. On the other hand, Articles 77 and 78 regulating the succession of King Carol have been left in, although King Carol has now been dead these seven years and more. To the criticism that the new Act lacked harmony, M. Bratianu replied that it is the product of an inharmonious time. He might have added, with perfect justice, that it has at any rate the merit of being welded to political reality more closely than the old Constitution ever was.

This increase in realism at the expense of some of the former elusive idealism of principle would normally be not without considerable national and international advantages. But, in this case, the positive side of the bargain is lost altogether, because the new Constitution embodies a realism as seen by one party, and moulded on one moment, only. The new Constitution was drafted and shaped solely by M. Bratianu's Liberal Party. All the various parties of the Opposition have refused to have anything to do with the new Act, first because they consider that the present Chambers had no constituent jurisdiction; and, secondly, because they dislike intensely the character of the change. The fiercest opposition comes from the Peasant Party, for obvious reasons; and from the parties representing the regional interests of the new provinces, which complain, above all, that the new Constitution disregards their regional interests and peculiarities, that it favours rather than restricts centralism, and that it has failed to give force to the principles of the various National Pacts of Union, although Government and King had solemnly recognized them as forming Constitutional Acts. The new Rumanian Constitution fails, therefore, in its first purpose of providing a basis for the unity of New Rumania. It also fails to make room for the inevitably growing pressure of the new Peasant electorate. Worst of all, having been pushed through by the Party for the time in power without regard to the wishes and protests of the Opposition, the new Constitution creates a peculiarly serious situation, for, instead of the ordinary political changes, the country is exposed to the risk, in the immediate future, of a series of racking constitutional crises.

CONSIDERATION IN THE ROMAN LAW OF CONTRACT.

[*Contributed by* MELIUS DE VILLIERS, ESQ., *sometime Chief Justice of the Orange Free State.*]

THERE appears to be an idea prevalent amongst students of the Roman law that Consideration was unknown to the juristic system of Rome as an element in the constitution of a contract. Assuming an acquaintance with the elements of the Roman law of contract on the part of the reader, I shall venture to show that this is an incorrect idea; in fact, it would appear that in certain respects Consideration was by the law of Rome insisted upon to a greater extent than is required in English law. For instance, in the case of the contract of purchase and sale the contract was voidable if the price given was inadequate, and the price was considered to be inadequate unless it amounted to at least one-half of the real value. No general theory is anywhere in the Roman law laid down as to Consideration, but the general principle (which happens to have been laid down with respect to inadequacy of price) prevailed: *Aequo et bono non convenit aliquem lucrari cum damno alterius aut damnum sentire per alterius lucrum.*[1]

The word *causa* in Roman law bears various meanings; amongst others it specifically bears the meaning of what in English law is known as Consideration, although in its application it varies from the latter. We find an instance of this meaning in the case of the *Transactio*, or Compromise of Suit. In the case of an agreement of this kind each of the parties to it contemplates to derive from it the advantage that he is thereafter to be freed from the danger and trouble of litigation with regard to the subject of the compromise; and this concrete advantage is what was regarded as the Consideration which he enjoyed and which supported the agreement and secured its validity. *Si lis sit, hoc ipsum quod a lite disceditur causa videtur esse.*[2] So it is said also that each of the parties to the transaction must be given or promised something or allowed to retain something. *Transactio nullo dato vel retento vel promisso minime procedit.*[3]

A disputed matter being an essential element in the *transactio*, a question once arose, when two sisters had made a settlement as to the division of an inheritance to which they were jointly entitled and concerning which there had existed no actual dispute, whether such a settle-

[1] *Digest*, 23. 3. 6 and 12, s. 1. [2] *Digest*, 26. 6. 65, s. 1. [3] *Code*, 2. 4. 38.

ment was binding. The Emperor Antoninus, to whom the matter was referred, replied that it was so, inasmuch as each of the parties had derived from it this advantage, that the fear of litigation had thus been avoided.[1] Thus then there existed a Consideration similar to that which was present in the case of a *transactio*.

The fact that such Consideration existed in the *transactio* distinguishes an agreement of this kind from a gift. Thus the distinguished Roman jurist Paulus is cited in Justinian's *Digest* as laying down that when a person enters into a compromise the subject of compromise is some question of a doubtful nature at issue, the action relating to which is uncertain and has not yet been judicially decided; but when a person enters into an agreement by way of bestowing a gift he surrenders something that is certain and undoubted as an act of liberality. *Qui transigit re dubia et lite incerta neque finita transigit. Qui vero paciscitur donationis causa rem certam et indubitatam liberalitate remittit.*[2]

We may now examine some of the various classes of contract in the Roman law, premising that in every case the *causa* in the sense of Consideration must be *justa*—that is to say, unimpeachable in respect of law, morals or otherwise.

The innominate contracts were those to which no specific name, as a rule, applied, and in the case of which præstation and counter-præstation were required; in other words, a doing or giving by one person for the benefit of another in return for a doing or giving by the other. Such contracts then were by the Roman jurists distinguished as being in the form of either a *do ut des, do ut facias, facio ut des* or *facio ut facias*. It is obvious that Consideration was an element essential to the validity of such contracts, and (as in the case of *transactio*) the mere promise, made and accepted, to give or to do something, provided that an advantage accrued to the person making the promise, was sufficient to render the contract efficacious. In the case of the *permutatio*, or exchange (which, though it had a specific name, was yet a case of *do ut des*), it was a definite rule of Roman law that as soon as the contract was concluded the risk of the article which was its subject appertained to the person who had to receive it, just as in the case of sale and purchase[3]; the contract was thus complete. We do indeed find in the *Digest* the proposition: *Permutatio autem ex re tradita initium obligationi praebet,*[4] which at first sight seems to imply that the contract was incomplete so long as there had been no delivery on either side. But the word *obligatio* may be understood in two senses, namely, either that the liability imposed upon a person to do or give something whenever he might be called upon to do so, or that the liability is imposed upon him in consequence of his having been called upon to do so. It is in the latter sense that the word *obligatio* may be understood in the proposition here referred to. From the moment the agreement of exchange was

[1] *Code*, 2. 4. 2.
[2] *Digest*, 2. 15. 1.
[3] *Digest*, 19. 5. 5, s. 1.
[4] *Digest*, 19. 4. 1, s. 2.

made there existed the *obligatio* in the former sense—the liability, namely, to perform on the one part whenever there might be performance on the other part.

Curiously enough the proposition has been advanced by some modern writers on Roman law that the *causa* in the case of the innominate contracts is the performance on the one part. The reasons assigned for this proposition appear to be, in the first place, under an Edict of the Prætor no action lay at the instance of one party unless he had performed what was required of him to perform by virtue of the contract and that, in the second place, there existed, on the one side, a *jus pœnitendi*, or right to cancel the contract, upon notice given, when performance had not yet taken place on the other side. As regards the former of these reasons, it may be shown that in those parts of Europe where the local law is founded upon the Roman law the principle of the canon law has come into vogue that a tender to perform is equivalent to actual performance in respect of the actionability of any claim. Yet it would be difficult to assert that in such parts of Europe actual performance or a mere tender to perform is regarded as the *causa* establishing a contractual obligation. As regards the *jus pœnitendi*, inasmuch as a party who had actually performed his part of the contract had this right of cancellation it is difficult to see how the completion of the contract could depend upon such performance. The *jus pœnitendi* appears to me to be nothing more than the expression of a rule requiring prompt performance. The action by which a person could reclaim an article which had been delivered to another who remained in default was the *condictio causa data causa non secuta*,[1] an expression which points clearly enough to the use of the word *causa* in the sense of Consideration.

Specific cases illustrative of what in the Roman law relative to innominate contracts is meant by *causa* appear in Justinian's *Digest*. Thus, referring to the case where a reward had been offered by the owner of a fugitive slave to a person for the capture and delivery of the slave, the jurist Ulpian said that when the slave had been captured and delivered to the owner an action accrues to the person to whom the offer had been made for the reason that the agreement comprised a definite bargain (*habet in se negotium aliquod*[2]). The transaction involving the *quid pro quo* was thus considered to be the determining factor in the agreement itself establishing obligation, which, when brought into operation by one of the parties, became actionable as against the other. In another place the same jurist says: "Even if the matter does not come to be assigned to some special class of contract, still, if there is a *causa*, then, according to Ariosto's well-expressed reply to Celsus, there is an obligation formed. For example, I have given you a thing on the understanding that you should give me another, or I have

[1] *Digest*, 12. 4. 5, ss. 1 *et passim*.

[2] *Digest*, 19. 5. 15. The word *negotium* is often used with the meaning of a permutative agreement.

given you something that you should do something; this, says Ariosto, amounts to synallagma, *i.e.* a contract, and a civil obligation will arise from it." [1]

The nominate contracts are classified as being established either *consensu, re, verbis* or *literis*. This does not mean that respectively *consensus, res, verba* and *literæ* are the *causæ* of the contracts so classified; these terms simply served for the purpose of classification. The contracts established *consensu* are purchase and sale, hiring and letting, partnership and mandate. It is obvious that in the cases of the three first-named contracts a *quid pro quo* was essential for their validity. As regards partnership it is remarked that a *leonina societas*—that is to say, a partnership in which the one partner derived all the profits and the other bore all the losses—was invalid. It was so, it is stated, because such an arrangement is *iniquissimum*. It was *iniquissimum* because it transgressed the rule *æquo et bono non convenit aliquem lucrari cum damno alterius aut damnum sentire per lucrum alterius*. The matter of mandate may be considered after the contracts established *re* (that is to say, by actual delivery of the thing which was the subject of contract) have been discussed.

The contracts established *re* were loan for use, loan for consumption, deposit and pledge. These were gratuitous in their inception, but they were not gratuitous in the sense that a gift was gratuitous, for after delivery of the thing which was the subject of contract mutual rights and obligations arose, which was not the case when a gift was made. Up to the time that delivery was made, there being no Consideration given or agreed to, the agreement was unenforceable as a contract. When delivery had taken place, however, a new condition of things arose. That having been achieved which the parties to the agreement had purposed to achieve, by delivery of the thing which the parties had agreed should be delivered, logically and equitably no inquiry further back could be allowed as to whether there had been any Consideration. In fact, now the rights and obligations which had been in contemplation of the parties may be regarded as the consideration acquired or given by each of the parties to the contract. In the case of a loan for use, for instance, there now arose the obligation on the part of the borrower to return the lent article unscathed at the proper time and the right to retain it till that time, and the obligation on the part of the lender to allow the use for such time and the right to demand it back unscathed at the proper time. In the cases of loan for consumption and of deposit (two of the so-called gratuitous contracts) a similar state of things prevailed.

The case of mandate or gratuitous agency is very similar to that of deposit. If Caius gave Marcus an article to keep until Caius returned from his travels it was a case of deposit. If Caius gave Marcus an article to sell for him it was a case of mandate. Originally mandate probably

[1] *Digest*, 2. 14. 7, 8. 2.

always related to the actual delivery of an article as in the case of deposit, and the same principle thus came to prevail as in the matter of deposit. Anyway, when a business of any kind was entrusted to a gratuitous agent and accepted by such agent he could no longer withdraw from the contract he had entered into. He thus became liable not only for misfeasance but also for nonfeasance.

There were in the Roman law certain agreements or pacts which did not fall under any of the classified contracts and which nevertheless created an actionable obligation. Of these it may generally be said that they related to a principal contract, and that the Consideration of such principal contract served as the Consideration for the pact. Justinian, however, introduced two new pacts which were abnormal, and in the case of which he "departed from the unbroken tradition of Roman law." [1] These were the *pactum donationis* and the *pactum de dote constituenda*. It was no longer necessary that a gift or *dos* should be effected by a *stipulatio*. There is some controversy as to the real effect of Justinian's legislation as to these pacts, but it is unnecessary to dwell upon this matter, as it did not affect the previously existing law in other matters.

In the case of the *stipulatio* there was no need for Consideration, in the same way as in English law there is no such need in the case of the contract under seal. The word *causa* is sometimes mentioned in connexion with the *stipulatio*, but in another sense.

The maxim of English law, *ex nudo pacto non oritur actio*, is taken over literally from the passage cited above in which the matter of *causa* is referred to.[2] The Consideration of English law may be of Germanic origin, but clearly those who adopted this maxim must have observed the analogy with regard to this matter between Roman and English law.

[1] Hunter, *Roman law*, 2nd Edition, p. 550.
[2] *Digest*, 2. 14. 7, s. 2.

A NEW ABRIDGMENT, AND THE NEED FOR IT.

[*Contributed by* CECIL T. CARR, ESQ., LL.D.]

ENGLISH law has an ancient tradition of Abridgments. Mr. G. J. Turner has discussed their early compilation in relation to the Year-books.[1] Professor Holdsworth has told the story more fully, adding some reflections on the extent to which the alphabet as a method of legal arrangement has dominated the literature of English law.[2] To the series which includes Pynson and Statham, Fitzherbert and Brooke, Rolle and Viner, there is now to be added a new volume, Fletcher Moulton's *Abridgment for* 1924.[3] Compared in bulk with those twenty-three volumes of Viner, the backs of which, at any rate, are known to all who frequent law libraries, the new-comer is an abridgment indeed. Its slender size is explained by the fact that it is a statement not of the whole of our law but only of the changes which have happened in a twelvemonth. An abridgment which is limited to a year's legal events may have but a year's usefulness, but we trust that this little book will annually be born again. At any rate it will not, like some of the more comprehensive compilations, be doomed to fall slowly behind the times or else to drag after itself an ever-lengthening tail of supplementary volumes. Like some of its ancient predecessors the new-comer is the kind of alphabetical commonplace book which might be noted up in a lawyer's chambers. It is planned not only for practitioners and students, but also for the business man and the general public. It is not every citizen who, with Samuel Pepys, would enjoy a morning spent in perusing the statute-book, or would find my Lord Coke's *Pleas of the Crown* very fine, noble reading. Still, there should be many who would be willing, in Mr. Moulton's words, "at the cost of an hour or two, to ascertain how the year's legal happenings have affected their business affairs." Perhaps this little book will indirectly serve a further and more ambitious purpose, and, as Hale wrote in the Preface to his *Analysis of the Civil Part of the Law*—

> do this much good, viz. First, it will discover that it is not altogether impossible, by much attention and labour, to reduce the laws of England at least into a tolerable method of distribution; secondly, it will give oppor-

[1] *Y.B.* 4 E. II (Selden Society, vol. vi), pp. xxix–xxxvi.

[2] *L.Q.R.*, January 1923.

[3] 1923: Ernest Benn, Ltd.; 12*s.* 6*d.* net.

tunity, both to myself and to others, as there shall occur new thoughts or opportunities, to rectify and to reform what is amiss in this, and to supply what is wanting.

Bearing this further purpose in mind, let us see what the new *Abridgment* has set out to do, what are the present difficulties with which those who seek to know our law must contend, and what the State does to satisfy the inquiry which it expects its citizens to make. At the outset the title *Abridgment for* 1924 requires a brief explanation. The book's summary of Acts stops short with the August adjournment of Parliament, and its notes of Statutory Rules and Orders and of judicial decisions end at July 31, 1923. It would be unfair to grumble at this curtailment. A book cannot be produced in a twinkling of an eye. If it appears in November it cannot embrace the events of the whole calendar year. The author can make his book speak to the end of December, in which case it will hardly appear before the spring ; or he can produce it in time for the New Year, when lawyers and laymen may be supposed to make good resolutions for the study of current law, in which case the book (like the Christmas magazines) must go to press in the autumn. This new, and, we hope, annual, Abridgment therefore must be understood to contain the law of a year which ends at the summer holidays, by which time Parliament has normally passed the major part of its legislative programme. Inevitably, at whatever date the author of a periodical summary may draw the line, and even if at the eleventh hour he supplements his labours with pages of addenda, something will happen to disturb his most careful arrangements. Thus, Mr. Moulton's recapitulation of Workmen's Compensation law is upset by the passing of the Act which was the sole product of the brief November session. In a work of such wide compass and such vigorous compression there are not many faults to find. The statement that the surviving remnant of the Sale of Food Order expires December 21, 1923, omits to take account of the Expiring Laws Continuance Act. The permitted increase of rent on sub-tenancies is wrongly given as based on standard rent instead of on net rent. A more serious matter is the inexplicable entry of the National Health Insurance Act, 1923, described as a consolidating Act repealing all previous enactments, but, in itself, making no change in the law. This is an unlucky anticipation of something which never happened. A consolidation Bill was introduced in the House of Lords in July ; there was every hope that it would become law in the autumn, but the dissolution intervened.

The annual accretions to our law form a formidable total. In the Foreword to his *Abridgment* Mr. Moulton offers a rough estimate of their bulk. To assimilate the mass which he set himself to digest " involves in an average year the perusal of about half a million words of Statutes, a similar amount of Statutory Rules and Orders, and from eight to ten million words of Law Reports." With the Law Reports our Society

of Comparative Legislation is concerned only to the extent that the judicial interpretation of enactments may reveal loopholes or limitations or other surprises which require fresh law-making. If we take merely the mass of parliamentary and departmental legislation (the latter of which Mr. Moulton seems to have underestimated), its outward unwieldiness and its inward disorder cry aloud for abridgment. In the matter of its arrangement and accessibility it is notorious that students of English legislation want all the guidance they can get. Other countries may manage to state their laws on various subjects in a compendious and comprehensible form rather than in a multitude of overlapping and amending statutes. The working of the British parliamentary machine merely makes the riddle harder. To take three recent examples, Parliament during 1923 had to deal with housing, with the temporary continuance of the restrictions upon the increase of rent, and with workmen's compensation. Each of these subjects intimately concerns the ordinary citizen—in his home, or in his rights and duties as landlord or tenant or as employer or employee ; it is over some aspect of these rights and duties that the average citizen who pays his debts and keeps clear of bankruptcy is most likely to find himself making first-hand acquaintance with the law in a County Court. Yet in each case an already intricate mass of enactments has been made more difficult to understand by the superimposition of yet another intricate enactment. No layman and not many lawyers will care to fit together the successive laws on these three subjects. To strike out the repealed passages and to write in the amendments and additions is a heavy task, but even then the process is not complete nor does the resulting document contain a straightforward statement of the law. There is just the same tangle in the field of local legislation, though here it is to be noted that year by year various local authorities set an honourable example by consolidating all their Acts and Orders into a sort of civic code. The locality thus obtains in a single orderly document all the local law—at any rate, until the process of further amendment begins all over again.[1] In the field of public law this process of abridgment by means of consolidation seems to offer the only hope of reducing the ever-growing bulk of our legislation. To find the law on any particular subject scattered over a succession of amending and re-amending Acts, to wipe the slate of this confused and illegible ciphering, and to write the whole afresh in ship-shape fashion—this will not make the law simple or amusing but at least it will give the student only one Act to study at a time. Official spokesmen in Parliament have undertaken that this process of consolidation shall be applied to the law of property (as revolutionized by Lord Birkenhead's Act), to national health insurance, to housing, to public health and to workmen's compensation ; other extensions of the programme are known to be either ready or in contemplation. Much, indeed, has been done. When Sir

[1] See, for example, the recent Acts relating to the Chesterfield, Lytham St. Anne's and Stoke-on-Trent corporations (13 & 14 Geo. V, cc. xcix, lxxxvi and cvii).

Courtenay Ilbert published his *Legislative Methods and Forms* in 1901 the work seemed to have come to a standstill. In later years the reproach has been removed. The Post Office in 1908, assurance companies in 1909, licensing in 1910, perjury in 1911, pilotage in 1912, bankruptcy (Scotland) and forgery in 1913—these form a list (which might be enlarged) of continuous progress in improving the form of our law by means of consolidation. Even the Great War did not interfere with the movement. Bankruptcy (England) in 1914, the Government of India in 1915, larceny in 1916, income-tax in 1918—these were solid measures of the same kind which showed that legislation during the war was not solely an affair of improvized emergency regulations. The consolidation of police pensions, almost accomplished in 1920, was achieved in 1921 together with that of English education and Scottish trusts, two notable attainments in draftsmanship. The following year witnessed no consolidation, but Parliament tidied up several loose ends in the statute-book by either repealing or making permanent a number of temporary Acts hitherto annually continued by the Expiring Laws Continuance Act. The year now past has produced separate consolidations of the English and Scottish law of agricultural holdings; eighteen acts relating to salmon and freshwater fisheries in England have been abridged into one; and, as already stated, other measures are awaiting their opportunity. Even the intricacy of successively superimposed amendments in matters like housing, rent restriction and workmen's compensation is easier to bear if viewed as the final stage before consolidation, for it is no use to consolidate so long as proposals for amendment are outstanding.

The citizen can have a tidier statute-book if he will decide that he wants it. Parliament will improve the form of the law if the public insists. The need of improvement is no new idea. King Edward VI at the age of fourteen suggested that "superfluous and tedious statutes" should be "brought into one sum together and made more plain and short, to the intent that men might better understand them." Sir Nicholas Bacon made a plan for reducing, ordering and printing the Statutes of the Realm, proposing that "all the Acts be digested into titles and printed according to the abridgment of the statutes." James I spoke to Parliament of the "divers cross and cuffing statutes," and in 1616 he was shown by Sir Francis Bacon a proposal for a digest. A committee was set up under the Commonwealth to revise the existing Acts and Ordinances and to consider how they might be "reduced into a compendious way and exact method for the more ease and clearer understanding of the people."[1] If little was achieved officially till the nineteenth century, ingenious minds must often have dwelt upon the idea of improvement. Prynne, for example—if we may quote Pepys again—

> till company come, did discourse with me a good while alone in the garden about the laws of England, telling me the many faults in them, and among

[1] See the references in c. iv of Sir C. Ilbert's *Legislative Methods and Forms*.

others their obscurity through multitude of long statutes, which he is about to abstract out of all of a sort, and, as he lives and Parliaments come, get them put into laws and the other statutes repealed, and then it will be a short work to know the law, which appears a very noble good thing.[1]

If Prynne were alive to-day would he still think it a job which one man could tackle single-handed? And could Parliament be expected to give official sanction to the operations of a volunteer? Another interesting proposal has lately been published.[2] In a private letter written in 1876 William Cory outlined a plan for what he calls a judicial duumvirate *legibus scribendis*.

I should like to see all our working judges . . . meet to ballot for the election of two of their number to be set free for two years from all judicial work, to codify and prepare laws. . . . The two best men should agree upon every word. At the end of the two years, on a fresh ballot, let one be re-eligible. They would do much better than a Minister of Legislation. They would relish the innings as a change. They would, as representatives, have incomparable authority with Parliament.

Cory was assuming that codification was both possible and desirable, and that a good judge is also a good draftsman. Meanwhile, until a plan of some sort is adopted, until another Bentham arises to condemn the condition of our law and to point out how far in this respect the mother-country lags behind other parts of the British Empire, the burden of improving the statute-book has been shouldered by the Statute Law Committee, a body of experts in draftsmanship and administration, of whose labours, unobtrusive and unpaid, Sir Courtenay Ilbert has given the history. Those labours are twofold. In part the Committee concerns itself with the literal abridgment of the law, the lightening of the statute-book. The bulk is reduced by the process of consolidation or the dead-weight of obsolete Acts is cut away by the process of statute law revision which makes it possible to produce in handier form the official volumes of *Statutes Revised*. In part the Committee directs the preparation of periodical indexes, an alphabetical anatomization or analysis of legislation not far removed in purpose from the compilations of the old abridgment-makers. There are indexes both of the public general statutes and of the local and private Acts of each year, and an annual Chronological Table and Index of all the statutes in force; there is an index to the Statutory Rules and Orders of each year, and a periodical index (last issued in 1920, but now about to be issued again in 1924) of all the Statutory Rules and Orders in force. The most cursory statement of these official activities would be incomplete without mention of Mr. Alexander Pulling, who for a generation has been identified with the work as Editor. He was the first to attack the deposit of Orders in Council

[1] Pepys, *Diary*, v, p. 279.
[2] *Ionicus* (Lord Esher's edition of Cory's Letters), pp. 124–5.

and other forms of delegated legislation buried in the unexciting columns of the *London Gazette*.[1] The insight thus obtained into departmental law-making led him on to pioneer work in compiling, under direction of the Statute Law Committee, an index of all the legislative powers delegated by Parliament to the Privy Council or to other departments of the State, together with a complete list of all the extant orders, rules and regulations made thereunder. Even before the Rules Publication Act of 1893 he had initiated the series of annual volumes of that departmental legislation—volumes which are essential to a study of public administration in this country. It is a fault of legislation by Orders in Council, observed Lord Justice Bankes in the *habeas corpus* proceedings of the Irish deportees, that it is not included in the statute-book and is therefore difficult to find.[2] But for Mr. Pulling's inspiration and industry, it would be not only difficult but impossible. When during the war the Defence of the Realm Acts flooded the country with a torrent of regulations and orders, it was he who directed them into the channels of publication. Thus to evolve system out of chaos is surely to continue and uphold the traditions of those ancient compilers of Abridgments who patiently elaborated their alphabetical sections for the better knowledge of that which by the most fictitious of legal fictions every citizen is supposed to know. The ill-mapped area of English law needs all the sign-posts which either public or private enterprise can supply. Official indexes, periodical summaries of the contents of the Law Reports, Mews's *Annual Digest of English Case Law*, the yearly volume of Chitty's alphabetized and annotated *Statutes of Practical Utility*, and all the other yearly compilations for the use of lawyers, annual diaries, pocket-books, companions and remembrancers—all are needed for the exploration and the ascertainment of the law. To their company Fletcher Moulton's *Abridgment for* 1924 is a welcome addition.

[1] Index to *London Gazette* 1830–83, compiled for the Incorporated Society of Law Reporting, 1885.

[2] [1923] 2 K.B. at p. 382.

NOTES ON THE LEGISLATION OF THE ANGLO-EGYPTIAN SUDAN.

[*Contributed by* D. Gwyther Moore, Esq.]

It seems convenient to preface these Notes by a brief allusion to the recent "conversations" between Great Britain and Egypt in which the Anglo-Egyptian Sudan has been incidentally referred to.

The political fact of the British Protectorate declared in Egypt on December 18, 1914, was dealt with a few years ago in this *Journal* by Sir Malcolm McIlwraith in a paper entitled, "The Declaration of a Protectorate in Egypt and its Legal effects." [1]

As events have turned out, the hopes expressed in that Article for "the future happiness and prosperity of the new Protectorate" must be transferred to the new regime of an independent self-governing Egypt. The point to be here emphasized, however, is that these successive changes of Egyptian status have not affected the separate character of the Sudan Administration.

In the Declaration of H.B.M.'s Government of February 28, 1922, abolishing the Protectorate in Egypt, "the Sudan" was mentioned, in company with some other vital matters, as a reserved question,[2] whilst at a latter stage, during the framing of the Egyptian Constitution, the special status of "the Sudan" was again recognized.

"The Cromer Agreement."—The *fons et origo* of the laws of the modern Anglo-Egyptian Sudan is a document entitled, "Agreement between Her Britannic Majesty's Government and the Government of His Highness the Khedive relative to the future Administration of the Sudan." This document, which very fittingly bears the signature of its author, Lord Cromer, was "Done in Cairo the 19th January 1899," and the appointment of Lord Kitchener as First Governor-General of the Sudan took effect the same day. Four months only had elapsed since the battle of Omdurman,[3] an event which, as all the world knows, finally overthrew the detestable reign of barbaric despotism which had prevailed since 1885—the year of Gordon's tragic death in Khartoum.

The Agreement, which is contained in 13 Articles of admirable sim-

[1] *Journal of Society of Comparative Legislation*, New Series, vol. xvii, part 3, November 1917, p. 238.

[2] White Paper, Egypt No. 1 (1922), Despatch No. 35.

[3] September 2, 1898.

plicity, has continued until the present time without amendment except in one particular relative to the status of the town of Suakin—a matter dealt with by a Supplemental Agreement of the same year.[1]

The particular Article with which these Notes are more especially concerned is No. IV, which provides: "Laws, as also Orders and Regulations with the full force of law, for the good government of the Sudan, and for regulating the holding, disposal and devolution of property of every kind therein situate may from time to time be made altered or abrogated by Proclamation of the Governor-General."

The Governor-General's Council.—Though, as indicated, Art. IV remains the basis of authority for the independent legislation of the Sudan, since the year 1910 there has been associated with the Governor-General a Council to aid in the discharge of his executive and legislative powers.

The Governor-General's Council Ordinance 1910 (No. 1 of 1910) (as amended by No. 1 of 1919) created a Council composed of three official (and *ex-officio*) members, with not less than two nor more than five additional members appointed by the Governor-General.

Section 5 provides, in effect, that the legislative powers conferred by Art. IV of "the Cromer Agreement" shall be exercised by the Governor-General in Council. In s. 9 is contained a power for the Governor-General to overrule a decision of the Council for reasons to be recorded in the proceedings.

The Penal Code.—"The Sudan Penal Code," bearing the signature "Kitchener of Khartoum," and its counterpart "The Sudan Code of Criminal Procedure," both promulgated on October 2, 1899, have been gradually put into operation in various provinces until they are now in force throughout the Sudan. These Codes, under the title "Soudan Criminal Law," formed the subject, when they first appeared, of a characteristic article by the late Mr. W. F. Craies.[2]

Space does not here permit expansion of Mr. Craies' brief review. The Codes are at the moment under revision and are expected to be published in their revised form during 1924.

Basis of Civil Law.—The publication of the Penal Code was succeeded in a few months by the Sudan Civil Justice Ordinance (No. 2 of 1900).

This Ordinance, which was founded on a Code then in force in certain backward parts of India, is divided into four parts: Part I, Preliminary; Part II, Law to be administered; Part III, Constitution and Powers of Civil Courts; Part IV, Civil Procedure.

(*a*) *Law to be administered.*—The provisions under this head are packed into two sections, and as representing the fundamental basis of civil justice in the Sudan it seems fitting to state them here in full.

[1] For an interesting historical account of "The Cromer Agreement" *vide* Lord Cromer's *Modern Egypt* (Macmillan, 1908), vol. ii, at pp. 115 *et seq.*

[2] *Journal of Society of Comparative Legislation*, New Series, vol. ii, part 1, April 1900, p. 137.

3. (2) Where in any suit or other proceeding in a Civil Court any question arises regarding succession, inheritance, wills, legacies, gifts, marriage, divorce, family relations, or the constitution of wakfs, the rule of decision shall be:

(*a*) Any custom applicable to the parties concerned, which is not contrary to justice, equity or good conscience, and has not been by this or any other enactment altered or abolished, and has not been declared void by competent authority;

(*b*) The Mohammedan Law, in cases where the parties are Mohammedans, except in so far as that law has been modified by any such custom as is above referred to.

4. In cases not provided for by section 3 or by any other law for the time being in force the Court shall act *according to justice, equity and good conscience.*

Positive enactments have since provided Codes in respect of large branches of Civil Law, but in the vast range of " cases not provided for by any other law for the time being in force " the rules of law are being established by judicial decision. Printed reports are not yet available to permit a critical examination of the general trend of decisions, but so far as the writer is aware much of the English Common Law has been fully embraced.

(*b*) *Civil Courts.*—Part III has been repealed by the Courts Ordinance 1915, and the present constitution of the Civil Courts is as follows: (1) a High Court of Justice consisting of Courts of original jurisdiction (and a Court of Appeal) staffed by the Chief Justice and Judges of the High Court; and (2) a Province Court in each province presided over by a Province Judge or by District Judges—the latter being of three grades with corresponding limits of jurisdiction.

These Civil Courts are in effect competent to decide all issues except in any suit between Mohammedans which may involve specified matters of succession and personal law—unless all parties consent.

(*c*) *Civil Procedure.*—Part IV remains for the most part still in force and forms a Code for the administration of justice in the Civil Courts. It has been supplemented by an enactment making provision for Arrest and Attachment (No. 7 of 1915).

Mohammedan Law.—The old " Sharia " Courts were given a place in the judicial system under the new Government. By the Sudan Mohammedan Law Courts Ordinance 1920, and the Regulations issued thereunder, provision was made for the separate and independent organization of Mohammedan Law Courts for the administration of specified matters, s. 6 being as follows:

The Sudan Mohammedan Law Courts shall be competent to decide:

(*a*) Any question regarding marriage, divorce, guardianship of minors or family relationship, provided that the marriage to which the question related was concluded in accordance with Mohammedan Law or the parties are all Mohammedans.

(*b*) Any question regarding wakf, gift, succession, wills, interdiction or guardianship of an interdicted or lost person, provided that the endower, donor or the deceased or the interdicted or lost person is a Mohammedan.

(*c*) Any question other than those mentioned in the last two sections provided that all the parties, whether being Mohammedans or not, make a formal demand signed by them asking the Court to entertain the question and stating that they agree to be bound by the ruling of Mohammedan Law.

Questions of conflict of jurisdiction are referred to a Council representative of the two jurisdictions.

The Mohammedan Courts comprise the High Court, Province Courts and District Courts.

The High Court (sitting in Khartoum) is composed of the Grand Kadi, the Mufti, and one or more additional members. The other Courts are presided over by a single kadi.

A useful "liaison officer" for the British Judge or Administrator has been provided in an English translation of the Mohammedan Code of Personal Law—the Code being that of the Hanafite School which is applied in Egypt and the Sudan.[1]

General Review of Legislation.—The abrupt termination of a reign of anarchy, and its replacement by the administration set up under the Cromer Agreement, gave such a new start to the Sudan that it has been thought desirable to review the legislation of the Sudan with special relation to the general progress of the country, and this summary will be published in the next *Review of Legislation.*

[1] *Code of Mohammedan Personal Law*, translated by Wasey Sterry, Esq., C.B.E. (Legal Secretary, Sudan Government), and N. Abarcarius from the Code compiled by Mohamed Kadri Pasha.

NOTES ON IMPERIAL CONSTITUTIONAL LAW.

[*Contributed by* PROFESSOR BERRIEDALE KEITH, D.C.L.]

The International Status of the Dominions.—The Imperial Conference of 1923, while in the main it avoided constitutional issues, necessarily gave serious consideration to the question of the Dominions and the treaty power raised by the mode of concluding the Pacific Fisheries Treaty of March 2, 1923. The conclusions of the Conference [1] are in effect in favour of accepting the *status quo*, with but slight modification. It is important that a clear distinction is drawn between treaties between the heads of states, signed by plenipotentiaries under full powers, and formally ratified by the heads of the states, and agreements, usually of a technical or an administrative character, made between governments, acting through representatives without full powers, and not formally ratified, even when some form of confirmation by the governments concerned is required. The validity of such non-treaty agreements is specifically recognized, but, for the first time, the very legitimate suggestion is made that, before entering on negotiations for any such agreement, the government concerned should consider whether the interests of any other part of the Empire may be affected, and, if so, steps should be taken to ensure that the government of any part affected is informed of the proposed negotiations, in order that it may have an opportunity of expressing its views. It may be noted that agreements of this kind are asserted to be usually of a technical or administrative character, but no limitation of the right of concluding such agreements is suggested, and the Conference may thus be held to approve *ex post facto* the informal trade agreements of Canada in the period 1910–11. The propriety of consultation in such cases is obvious, and is admirably illustrated by the agreement between the Union of South Africa and Mozambique of 1923, which was concluded with the full approval of the British Government. The conclusion of such agreements, it is clear, does not affect the status in international law of the Dominions; they are definitely declared not to be treaties.

The Signature and Ratification of Treaties.—In the case of treaties it has been decided by the Conference to retain the existing practice as to signature and ratification. That means, of course, the negation of the right of exercising the treaty power to any Dominion, for every treaty must be concluded by a plenipotentiary under full powers granted by the King on the formal authority of the Imperial Government through the Secretary of State for Foreign Affairs, and the instrument of ratifica-

[1] Parliamentary Paper Cmd. 1887, pp. 11 ff. Cf. this *Journal*, Third Series, vol. v, pt. iv, pp. 161 ff.

tion is issued on the same authority. The Conference has evidently dismissed as impracticable and unconstitutional the suggestion that the King should issue full powers and instruments of ratification on the direct advice of Dominion Governments or that the Governors-General should be given a delegation of power to issue such authorities. It is indeed plain that the King cannot act on the advice of more than one set of ministers, while the grant to the Governors-General of the treaty power would mean the dismemberment of the Empire. The one change in the established rules of 1895 and 1907 [1] is the recognition of the principle that bilateral treaties imposing obligations on one part of the Empire only should be signed by a representative of the Government of that part, and that the full power issued to such representative should indicate the part of the Empire in respect of which the obligations are to be undertaken, and the preamble and the text of the treaty should be worded so as to make its scope clear. Where a bilateral treaty imposes obligations on more than one part of the Empire, the treaty should be signed by one or more plenipotentiaries on behalf of all the Governments concerned, and treaties negotiated at International Conferences should be signed by plenipotentiaries on behalf of all the Governments represented under full powers in the form adopted for the Paris and Washington Treaties. The decision, in effect, approves the mode of signature adopted in the case of the Fisheries Treaty of 1923, if, as Canada holds, that treaty affects Canada only, while it disapproves it if, as held by the Senate of the United States, the treaty really applied to the whole of the Empire. The Conference affirms also the doctrine that no treaty should be negotiated on behalf of any one part of the Empire without full consideration of the interests of the other parts, and that, if the interests of any other part are seriously involved, the Government of that part should share in the negotiations. The advantage of the principle is obvious ; under it Australia, for instance, should make no arrangement with a foreign power which might affect New Zealand trade or *vice versa* ; hitherto, it has been the obligation of the British Government alone to consider negotiations from the Imperial aspect ; now the obligation is recommended for acceptance by all the Governments of the Empire.

The Prerogative of Dissolution.—The appearance in Britain of three strong parties in the House of Commons gives special interest to an exposition of the view of the power of the Lieutenant-Governor in a Canadian Province recently made by Sir James Aikins in an address to the representatives of municipal authorities of Manitoba.[2] In 1920 the election returned four groups to the Legislature, the governmental party having the largest number of supporters, but not a majority. The Premier consulted with the Lieutenant-Governor to decide the proper course of action to be followed, and it was agreed that the normal

[1] *Responsible Government in the Dominions*, iii, 1116 ff.
[2] *The Western Municipal News*, Dec. 1923, pp. 346 ff.

rule, that a ministry which fails to attain a majority at the polls resigns office without waiting to meet Parliament, was not applicable, and that the administration should meet the House and carry on, so long as the majority of members would accord it support. This was done, and the Government actually survived one whole session and the greater part of another, when it suffered a distinct defeat. The Premier then simply tendered his resignation, but Sir James Aikins declined to accept it, on the ground that supply had not yet been passed, the new ministers, even if a government could be formed from the smaller opposition groups, which were quite distinct from one another, would have to be re-elected and to study afresh departmental needs, and there would thus be delay in securing supply. He held further that a dissolution was really essential; the groups in the House could not work together, and there was evidence that the House no longer represented the electorate. The Premier, after conference with the Lieutenant-Governor, agreed not to resign, but to carry supply, and to proceed with preparations for an election, refraining from contentious legislative projects pending the election, and confining himself to routine administration. The election ensuing solved the difficulty in some measure by giving the farmers' or progressive party a majority in the House. The active part played in the arrangements by the Lieutenant-Governor is interesting and important, exemplifying the value of the office in the Canadian provinces. But the possibility of such action is, of course, largely facilitated by the fact of which Sir James Aikins reminded his audience, that the Lieutenant-Governor is not irresponsible; if in the exercise of the royal prerogative he should offend public opinion, he may be removed—as has happened in two remarkable cases in the past—by the Dominion Government. Similarly in the case of Governors-General and Governors appointed by the King on the advice of the Imperial Government, erroneous use of their powers can always be checked by recall, and the argument, that the Crown in the United Kingdom has the same discretion in regard to the grant of dissolutions as the Governor-General or Governor of a Dominion or State, ignores the essential distinction. It is of the essence of responsible government that the Sovereign should be relieved whenever possible of personal responsibility, nor is there any compelling ground to require him to take the very grave responsibility of declining a dissolution, since a dissolution involves an appeal to the electorate who are the final authority. The parallel sometimes suggested with the responsibility necessarily assumed by the Crown on the resignation of a ministry of selecting the new Prime Minister is manifestly erroneous; a minister who resigns clearly has no title to offer advice which the Crown is bound to accept; a minister who advises a dissolution appeals from a Parliament which he deems unrepresentative of the electorate to the people themselves.

Bona vacantia in Canada.—The slow process of explication of all the meanings involved in the British North America Act has been

carried one step further by the decision of the Privy Council in *R.* v *Attorney-General for British Columbia*,[1] that *bona vacantia* in the province of British Columbia fall to the Crown in right of the province and not to the Crown in right of the Dominion. The question arises from the reservation by s. 109 to the provinces of all lands, mines, minerals, and royalties belonging to them at the union. The issue came to a head in *Attorney-General for Ontario* v. *Mercer*,[2] when the Judicial Committee decided that lands which escheated to the Crown after 1867 fell to the province and not to the Dominion, and in that judgment the Committee negatived the claims of the Dominion that royalties must be confined to mining royalties, and that, even if it were held to have a more extended sense, it could not include all *iura regalia* and certainly not *bona vacantia*. Indeed, Lord Selborne indicated the probability that royalties should be understood to cover *iura regalia* generally, pointing out that a grant of *iura regalia* belonging to the County Palatine of Lancaster included the right to all *bona vacantia*.[3] In the subsequent case of *Attorney-General for British Columbia* v. *Attorney-General for Canada* [4] the Privy Council held that all deposits of precious metals in British Columbia belonged to the province as being included under royalties. This conclusion obviously went far to cover *bona vacantia* in the shape of cash, since it would be difficult to distinguish between precious metals *in situ* and as worked into coin. For the Dominion, however, it was endeavoured to save *bona vacantia* by claiming that the enumeration must be governed by the *eiusdem generis* rule, and the royalties, therefore, be confined to those of a distinctly territorial character, and that in any case it must be shown that the royalties belonged to British Columbia at the time of union in the sense that they had actually been appropriated by the province, and were not merely susceptible of appropriation by arrangement with the Crown. The last point was evaded by the Committee on the score that the Dominion had not as a matter of fact established their contention that the royalties had not been appropriated, while their Lordships declined to feel bound to apply the technical rule to this particular enumeration. The result, however, leaves other *iura regalia* still of uncertain destination, for their Lordships refused to give the general ruling which has long been desired. Still, as these *iura* are of minor importance, flotsam and jetsam, deodands, swans and sturgeons, *et hoc genus omne*, and in point of fact difficulties can hardly now arise as regards them, the litigation may perhaps now be deemed to have been brought to a close.

The Irish Free State and the Judgments Extension Act, 1868.—The Court of Appeal in *Wakely* v. *Triumph Cycle Co., Ltd.*,[5] has decided that the Judgments Extension Act, 1868,[6] is no longer in force in the

[1] 40 *The Times* LR. 13.
[2] 8 App. Cas. 767.
[3] *Walford* v. *Dyke*, 5 Moore P.C. 434. 40 *The Times* L.R. 15.
[4] 14 App. Cas. 295, cf. p. 305.
[5] 31 and 32 Vict., c. 54.

Irish Free State. The question arose on a minor issue, namely, whether a plaintiff resident in the Irish Free State should be required to give security for costs in respect of an action in the High Court; in the Court below Mr. Justice Swift held that no security need be given, since the plaintiff, if unsuccessful, could have a judgment for costs enforced against him under the Judgments Extension Act, 1868, which was still applicable to the Free State. The Court of Appeal declined to accept this view. It held that the Act of 1868, if in force at all in Ireland, was so in virtue of the express provision to this effect in the Government of Ireland Act, 1920.[1] Now, s. 73 of the Constitution of the Free State[2] maintains in operation until repealed "the laws in force in the Irish Free State at the date of the coming into operation of the Constitution," namely, December 6, 1922. On December 5, 1922, however, was passed the Irish Free State (Consequential Provisions) Act, 1922,[3] s. 1 of which provides that the Government of Ireland Act, 1920, shall cease to apply to any part of Ireland other than Northern Ireland. It follows, therefore, that on December 6, 1922, the Judgments Extension Act, 1868, has ceased to be in force in Ireland and outside Northern Ireland, and its operation was not preserved by s. 73 of the Constitution. The result is interesting, and doubtless unexpected; the Irish Free State in this respect now stands in the position of a Dominion, and for the enforcement of judgments recourse, in the absence of special legislation, will be necessary to the arrangements made under the Administration of Justice Act, 1920.[4]

Actions against the Crown in Ireland.—The decision in *Great Southern and Western Railway Co.* v. *The King*[5] affords an interesting illustration of a doctrine familiar in the Dominions of the distinction between the Crown in right of its several possessions. During the war in 1917 the President of the Board of Trade entered into an agreement with the Company under which, in consideration for certain railway material supplied by the Company, the Government undertook to bear the cost of replacing the material removed. A petition of right was brought to enforce this obligation, and was met with the contention that by legislation in the United Kingdom and the Free State the liability had passed to the Ministry of Economic Affairs of the Provisional Government of Southern Ireland, and thence to the Government of the Irish Free State. It is, of course, clear that the result stated to have been achieved was what must have been intended when the Free State received Dominion status, and the Court had no difficulty in holding that the contract, as regards rights and obligations, was effectively transferred to the Irish Government by the Provisional Government (Transfer of Functions) Order in Council of April 1, 1922, made under

[1] 10 & 11 Geo. V, c. 67.
[2] Scheduled to 13 Geo. V, c. 1.
[3] 13 Geo. V, c. 2.
[4] 10 & 11 Geo. V, c. 81; Dicey and Keith, *Conflict of Laws*, pp. 462 ff.
[5] 40 *The Times* L.R. 98.

the authority of the Irish Free State (Agreement) Act, 1922, s. I (2) and s. 80 of the Constitution of the Irish Free State. The obligation on the Crown, of course, remained, but the aspect in which the Crown was concerned had been duly changed, and the Imperial Exchequer was not liable. An interesting question, which did not require decision, was suggested by the argument of Sir John Simon that a Dominion legislature had no power to pass an Act to destroy pre-existing rights under a contract made with a Government Department in the United Kingdom. It would seem difficult to accept this doctrine as valid; but the matter is largely one of private international law, involving the issue of the proper law of a contract.[1]

Taxation of Crown Property.—The Judicial Committee's decision in *Attorney-General for British Columbia* v. *Attorney-General for Canada*[2] admirably illustrates the distinction of aspects of the Crown in Canada, for it decides that the Dominion Parliament can impose taxation on property belonging to the Crown in right of a province. The issue was raised over the right of Canada to levy duties on whisky imported by the Government of British Columbia in pursuance of the local legislation under which the sale of liquor is carried on by the Government. The province naturally appealed to s. 125 of the British North America Act, which provides that "no lands or property belonging to Canada or any province shall be liable to taxation," although obviously this provision did not contemplate state trading on a scale which might very seriously affect the power of the Dominion to raise revenue. Still the words of the Act are such that it is not surprising that the Exchequer Court and the Supreme Court of Canada should have felt bound to decide against the claim of the Dominion. The Judicial Committee admitted the difficulty of the case, but it insisted that s. 125 must be interpreted so as not to conflict with the authority of the Dominion under s. 91 to regulate trade and commerce and to raise money by any mode of taxation. That the result is eminently reasonable cannot be disputed, but it certainly appears to have been arrived at by rendering s. 125 almost devoid of meaning, and the Provinces will doubtless now consider to what extent they can levy taxation under their own taxing powers on the lands which are the property of Canada.[3] It is interesting to note that their Lordships referred to, but did not consider it necessary to adopt, the reasoning by which the Commonwealth of Australia was held to be entitled to levy duties on railway material imported by New South Wales.[4]

Orientals in Canada.—The Judicial Committee has now fortunately solved the difficult question of the relative rights of the Dominion and Provincial Legislatures in Canada to regulate matters affecting the

[1] Cf. Dicey and Keith, *Conflict of Laws*, pp. 480 ff., 615 ff.
[2] 40 *The Times* L.R. 4.
[3] Compare *Montreal City* v. *Attorney-General for Canada*, [1923] A.C. 136.
[4] See *Responsible Government in the Dominions*, ii, 794 f.

employment of Japanese.[1] The Government of British Columbia definitely asserted the right by securing the passing of the Oriental Orders in Council Validation Act, 1921, to exclude Japanese and Chinese from employment by persons holding various licences and concessions from the British Columbia Government. The validity of the Act was directly challenged on two grounds: it was contended that it was an attempt to infringe the Dominion monopoly of legislation regarding aliens, under s. 91 (25) of the British North America Act, under the guise of a mere enactment regulating the use of the property of the province; and, secondly, that it directly contravened the most-favoured-nation treatment as to the pursuit of industries or callings given to Japanese subjects by the treaty with Japan, which was given effect in the Dominion by a statute of the Dominion Parliament in 1913. The decision of the Supreme Court of Canada was against the validity of the statute, though on divergent grounds, and the Judicial Committee has homologated this decision, while the statute has in addition been rendered void by disallowance by the Governor-General. It is important to note that, while the Judicial Committee rested its decision on the manifest discordance of the statute of the province with the Dominion statute giving effect to the treaty, it showed some change of view from the opinion expressed in the case of *Brooks-Bidlake and Whittall, Ltd.*, v. *Attorney-General for British Columbia*.[2] In that case their Lordships seemed certainly to incline to the view that conditions in licences excluding whole classes of aliens from employment were not *ultra vires* the province, as dealing with the rights of aliens, but could be defended as a legitimate exercise of the power of a province over its own property; in the later decision their Lordships seem to have been more impressed with the encroachment such legislation makes on the field of Dominion legislation affecting aliens; the principle, therefore, in *Union Colliery Co.* v. *Bryden*[3] may be said to have received some measure of revived animation. At any rate, the Committee has left itself entirely free to consider the matter on its merits, should, for instance, a case arise in which the Japanese Treaty is not concerned, and use be made of the legislative power of the province in its apparent sphere to impose a disability on any class of aliens. The attitude of the Committee illustrates the convenience of the power of that body to reconsider its opinions on sufficient cause arising.

The Chief Justiceship of Alberta.—In *Scott* v. *Attorney-General for Canada*[4] the Judicial Committee has finally established the validity of the appointment by the Dominion Government of Mr. D. L. Scott to be Chief Justice and President of the Appellate Division of the Supreme Court of Alberta, with the style of Chief Justice of Alberta and with *ex officio* membership, as Judge, of the Trial Division of that Court.

[1] *Attorney-General for British Columbia* v. *Attorney-General for Canada*, 40 *The Times* L.R. 7; compare this *Journal*, Third Series, vol. v, pt. iv, pp. 280 f.
[2] [1923] A.C. 450. [3] [1899] A.C. 580. [4] 40 *The Times* L.R. 6.

The difficulty arose out of the Judicature Act of 1919 of Alberta, which established an Appellate Division of the Supreme Court, with jurisdiction to hear appeals from the Trial Division of that Court, and provided for the appointment as President of the Appellate Division of a Chief Justice with the style of Chief Justice of Alberta. The Dominion Government appointed Mr. Scott to this post by letters patent of September 15, 1921, and simultaneously appointed Mr. Horace Harvey to be Chief Justice of the Trial Division of the Supreme Court, and an *ex officio* judge of the Appellate Division. Mr. Harvey already held under letters patent of October 12, 1910, the office of Chief Justice of the Supreme Court ; the validity of the new appointments was challenged, and, under the convenient procedure in force in the Dominion, the issue was referred by the Governor-General in Council to the Supreme Court. That Court held, as was not unnatural, in view of the rule of s. 99 of the British North America Act, that judges hold during good behaviour, that the new letters patent in both cases were void, and that Mr. Harvey remained Chief Justice of the Supreme Court with the style of Chief Justice of Alberta and was entitled to preside in the Appellate Division as Chief Justice of that Division. In effect, the decision of the Judicial Committee, overruling the Supreme Court, holds that the legislature was fully entitled to alter the constitution of the Court so as to create two Chief Justiceships, and that the existing Chief Justice of the Supreme Court was not entitled to insist on being appointed Chief Justice of the Appellate Division as well. The importance of the decision is much more than personal, for in some degree it diminishes the security of judicial tenure, though only indirectly. It is obviously a serious matter for a Chief Justice, if he can find an appellate court created over his head, and another judge elevated to the Chief Justiceship of that Court with the style which formerly he enjoyed. There may, as in this case, be no difference of emolument between the two Chief Justices, but the loss of prestige and precedence is obvious and undeniable.

The Status of Dominion High Commissioners.—The renewed discussion of the status in the United Kingdom of the High Commissioners of the Dominions gives interest to the most recent instance of assertion of the wide nature of diplomatic privilege in *Assurantie Compagnie Excelsior* v. *Smith*.[1] The Court of Appeal has decided without hesitation that it is impossible to enforce calls on shares against a domiciled United States citizen employed as head of the mail department of the United States Embassy in London, whose name was included in the list of Embassy officials communicated to the Foreign Office. A case like this illustrates the unwisdom of attempting simply to assimilate High Commissioners to Ambassadors in point of status and privilege. The inconveniences which arise from immunity from jurisdiction in respect of foreign Embassies would be greatly increased in the case of the staffs of High Commissioners.

[1] 40 *The Times* L.R. 105.

NOTES.

The French Law of Breach of Promise of Marriage.—The recent case of *de Pontevès* v. *Thompson* has attracted public attention to the French law as to promise of marriage and the consequences of its breach.

We are in the habit of believing that in French law no action will lie for breach of promise of marriage. This is true in the sense that, as noticed in the writer's work on the French Law of Marriage, a promise of marriage is not *per se* enforceable, and its breach, unaccompanied by other extraneous circumstances, cannot form the basis of a claim for sentimental damages. But if, on the faith of the promise, one or other of the parties has incurred expense in view of the marriage, then, if the marriage is broken off, the party who breaks it off is liable to make good the *material* damage incurred by the other party. This, however, as will be observed, is an action in tort rather than an action for breach of contract.

In the case of *L . . .* v. *Queunet* (*Gazette du Palais*, 1894, ii, p. 325) the Judges of First Instance had awarded the plaintiff, who was the prospective husband, 500 francs for expenses and "moral" damage. The Court of Appeal set aside the claim for moral damage, not on the ground that "moral" damage was not a valid cause of action, but because no moral damage was proved; at the same time it gave judgment in his favour for the actual expenses he had incurred in view of the marriage less the value of certain presents (including the wedding-ring) which his fiancée offered to return.

In the case of *Rivière* v. *Barry* (*Gazette du Palais*, 1895, ii, p. 90) the Court laid down that breach of promise of marriage did not amount to a breach of contract, but was a tortious act which might give rise to a claim for damage. In this instance the material damage was the expense the prospective husband had been put to in ordering the wedding-dress of his fiancée and having it cut out. Nevertheless, the Court gave judgment for an even amount (300 francs) without reference to the precise amount of the bill.

In the more recent case of *Ragot* v. *Hardy* (*Gazette des Tribunaux*, 1920, ii, p. 360) the Tribunal of Paris held on the contrary that a breach of promise of marriage which was capricious and without good and valid cause is good ground for an action for damages for the *moral* and material prejudice caused thereby; and the defendant, the prospective husband,

was sentenced to pay a lump sum by way of damages—without reference to the actual expense incurred by the lady or on her behalf.

In a footnote to this decision the Editor of the *Gazette* states that the law is settled in this sense. That is hardly the case. The better opinion is that stated at the outset, viz., that a mere promise of marriage is not of itself enforceable; but it may in such circumstances as are described in the cases cited amount to a tortious act giving rise to damages.

It also follows from the decisions cited that it cannot be said that the French Courts entirely reject the principle of "moral" or sentimental damage, because in two at least of the cases quoted damages of even amount were awarded without reference to the amount of the proved material damage. It must be recognized, however, that such damages have hitherto been insignificant, and it is unlikely that the French Courts would ever grant the swingeing indemnities for "wounded feelings" which English and United States Courts have not infrequently awarded. At the same time, once the principle of moral damage is admitted, it is a matter of speculation as to what the attitude of French judges would be in case, for example, one of the litigants succeeded in proving that through the breach of the promise he or she had forfeited the chance of marrying a millionaire. Even then it is hardly to be supposed that judges who are in receipt of an average salary of from £300 to £600 a year (par value) would be disposed to award such substantial damages as we are familiar with in like cases.

The case of *de Pontevès* v. *Thompson* is on a somewhat different footing. This case is still too recent to have been yet officially reported. Nevertheless, the newspaper reports sufficiently indicate the feeling of the Court on the issue. The lady had given only a very conditional promise hedged about by conditions which appeared to the Court inconsistent with a complete promise of marriage, as usually understood. Consequently the expense to which the prospective husband had been put was held to be part of the ordinary expense of courtship incurred rather with a view to encourage her to maintain and complete her promise than on the faith of the promise itself. And as the promise was held to be incomplete there could be no question of material, still less of moral, damage.

To resume, therefore: The ground of action properly speaking in the case of breach of promise of marriage is tort rather than contract. Damage must be proved. Sentimental or "moral" damage is not absolutely excluded, but its amount is usually insignificant and in the reported cases does not appreciably exceed the amount of the actual material damage.

O. E. Bodington.

International Court *versus* **International Arbitration.**—In the October number of the *Bulletin de l'Institut Intermédiaire International* there is published the text of a lecture delivered on July 31, 1923, at the Academy

of International Law by Dr. B. J. C. Loder, the President of the Permanent Court of International Justice on the subject of " The Difference between International Arbitration and International Justice." By the expression " justice " in this title the idea to be conveyed is that of a judicial method, or system of justice, rather than the idea of justice in the abstract.

Dr. Loder points out that, whereas the practice of arbitration, in both national and international matters, can be traced far back in history, the method of administration of justice by judicial decision has prevailed in the past exclusively in the national domain and is a new-comer in the international field.

He indicates concisely the distinction between the two methods, understood in the strict and technical sense, by saying that arbitration, in its nature, is the verdict of a judge who, by agreement made between the parties themselves, as an act of their free volition, is charged with the decision of a dispute ; whereas the method of judicial decision involves recourse to judicial power exercised in the name of the State, of which it is the organ, and operating independently of all agreement of the parties, and often of all volition on their part. Or, putting it in another way, arbitration means liberty in the recourse to the jurisdiction and in the choice of the tribunal ; while a judicial system means obligatory submission to a jurisdiction previously established. Dr. Loder expresses a justifiable regret at the loose use of terms which has often led to confusion between these two quite distinct ideas.

He describes the way in which the work done by The Hague Conferences of 1899 and 1907 affected the development of these ideas. The Convention for the Pacific Settlement of International Disputes, which was drawn up in 1899 and amended in 1907, provided a panel of arbitrators from among whom litigant States could conveniently select suitable arbitrators. It provided also a centre at which arbitrations could be held, and a code of procedure by which litigants could conveniently agree to be bound. But it did not depart from the real essentials of the arbitral method. The determination to use The Hague organization for settlement of any particular dispute, the actual constitution of the tribunal of arbitrators, and the definition of principles and conditions to govern the decision of the case remained in the category of matters to be agreed between any of the signatory Powers as and when they might become involved in any dispute.

Nevertheless, Dr. Loder sees great value in the establishment of The Hague Court of Arbitration, for the Convention of 1899, by which it was constituted, marks the first movement in the world of States for establishing an international jurisdiction with the aim of preventing, as far as possible, the recourse to force in the relations between States. It was the first step on the long and hard road towards universal law and a world jurisdiction, a road which has since been followed without interruption.

Dr. Loder traces the history of the unsuccessful attempt made at The Hague Conference of 1907 to create a true Court of International Justice; of the proceedings which led to the insertion in the Covenant of the League of Nations of the provisions contained in article 14 as to preparation of a plan for a permanent Court; of the steps taken by the Governments of Sweden, Norway, Denmark, Holland and Switzerland to formulate detailed proposals for the scheme of the Court; sittings and recommendations of the Committee of ten jurists ap by the Council of the League to draft the final scheme; and of cussions that arose and the changes that were made in the sche passed under consideration of the Council, first, and then the A of the League. He examines the Statute of the Court as it finally from this process of evolution, and describes the main chara of the Court thereby established, the extent and nature of the jur conferred upon it, and the respects in which it fell short of the p of the Five Powers, and of those of the Committee of Jurists. Both of these sets of proposals had aimed at the creation of a Court of Justice in the true sense, with obligatory jurisdiction in disputes of a "justiciable" character.

An interesting quotation is given from the famous letter of instructions addressed by Mr. Elihu Root, as Secretary of State, to the United States Delegates to the 1907 Hague Conference. Mr. Root contended that the chief objection to arbitration lay not so much in the repugnance of nations towards the submission of their differences to impartial decision as in the fear that the arbitration to which they submitted might not be impartial. The practice pursued by arbitrators was to act in the spirit of negotiators seeking a settlement of difficulties along the lines of diplomatic tradition and usage, rather than in the spirit of impartial judges exercising judicial responsibility. He thought that if it were possible to have a tribunal which would examine questions at issue between nations in the impartial and impersonal spirit which the Supreme Court of the United States brings to questions arising between citizens of different States, or between foreigners and United States citizens, the nations would be more disposed to submit their controversies to such a tribunal than they are to run the chances of an arbitration. He therefore desired the development of The Hague Arbitration Tribunal into a permanent tribunal composed of judges who would be its officers and nothing else; who would be adequately remunerated, and would have no other occupation but spend their whole time in the examination and judgment of international affairs under judicial methods and in a spirit of juridical responsibility.

In the Permanent Court of International Justice now established the world has obtained the sort of tribunal recommended by Mr. Root in those instructions. In strict juridical theory it rests, Dr. Loder contends, on the same basis as an arbitral tribunal, for both depend upon agreement between the litigants and there is no coercive force in

the international domain to execute either arbitral or judicial decisions. Both institutions therefore fail to attain the character of a Court of Justice in the true and full sense. But in the case of the Permanent Court the agreement is one made in advance and defined by treaty, and the reference is not to a tribunal of arbitrators chosen merely for the needs of the particular case, but to a college of judges composed without the necessity for direct intervention by the eventual parties. This arrangement has been rendered possible by the advent of a League of Nations, establishing the Court as one of its organs. It is an arrangement well calculated, in actual practice, to secure the exhibition of an impartial spirit, for such a spirit is more to be expected from a professional judge, acting as a permanent official, than from a temporary judge appointed by a party to a suit. It is also possible to secure, through the continuous work of a permanent body of judges, the development of a regular and systematic jurisprudence—a result which cannot be obtained from a series of disconnected decisions proceeding from different arbitral tribunals.

It is gratifying to find that Dr. Loder, after practical experience of the working of the Court, over which he presides, regards the creation of the Court as a hopeful launching of the Society of Nations upon a new route, and looks forward with confidence to the development of the Court into a fuller organ of justice, as it gains the confidence of the world and imposes the conviction that it is the faithful guardian of right. He claims that the desire to see justice reign in the world has entered into the human conscience, and recognizes that it has been engendered by the benefits which, for centuries, arbitration has conferred upon the world.

F. N. Keen.

Scandinavian Co-operation.—The need of the world to-day is for an increase of mutual understanding and co-operation between nations. The highest need is for universal understanding and co-operation upon such matters and in such measure as is necessary to ensure the prevention of war; but the attainment universally of such a minimum level is in no way inconsistent with a much fuller range of understanding and co-operation between particular nations or groups of nations within the general world community. Indeed, the exercise of the co-operative qualities on a limited field affords a practice-ground for international co-operation on a world basis; and in the growth of goodwill and good relations between particular nations connected by neighbourhood or other special ties, and its gradual spread over widening areas, lies the promise of development of universal goodwill.

Other things being equal, co-operation should be easiest between nations speaking the same language or languages closely allied, and belonging to the same or similar stock. Thus, co-operation between Great Britain and the United States of America ought, *prima facie*, to

be comparatively easy, while co-operation between Great Britain and France should be more difficult to secure, but for that very reason its attainment may be regarded as a greater and more important success. Looked at from this point of view the three Scandinavian nations, Sweden, Norway and Denmark are nations we might naturally expect would find progress in co-operation easy.

An article in the October (1923) number of the *Bulletin de l'Institut Intermédiaire International* shows that in fact these three Scandinavian countries have made very successful efforts in the field of co-operation and particularly in regard to the co-ordination of their legislation.

Taking the record since 1905, when the separation between Sweden and Norway occurred, we find the article mentioning joint projects comprising laws relating to sale of goods (adopted in Sweden in 1905, in Denmark in 1906 and in Norway in 1907); agents, brokers and commercial travellers (Sweden 1914, Norway 1916, Denmark 1916); sales in advance (Sweden 1915, Norway 1916, Denmark 1917); general conditions governing contracts relating to property (Sweden 1915, Denmark 1913, Norway 1918); adoption (Sweden and Norway 1917, Denmark 1923); and marriage and divorce (Sweden 1915, Norway 1918, Denmark 1922); the last showing considerable differences between the forms for the respective countries. It is mentioned also that common laws dealing with the acquisition and the loss of nationality have been elaborated, and that a unification of legislation relating to industrial property and contracts of assurance, and a revision of the maritime law are in course of preparation. In these last matters Finland also is associated in the common task.

The body of common Scandinavian law thus established has been evolved solely through the co-operation of commissions, to which the elaboration of schemes for the different laws has been entrusted, the legislative authorities of each of the three countries being entirely free to adopt or reject the schemes, as well as to abrogate or change, with complete independence, the laws adopted.

Within its limits this Scandinavian experience affords a striking proof of the possibilities of rapid success in co-ordinating the legislation of different countries, and a happy augury of what may be achieved through the spread of methods of this kind over wider areas of the community of nations.

Reference is also made in the same article to a long series of successful measures of economic and administrative co-operation achieved by the Scandinavian countries during the war, and to co-operation and conferences since the war on various matters of foreign politics, including the examination of the proposals for establishment of the League of Nations, and for its further development, and collaboration over matters arising in the course of the League's proceedings.

F. N. KEEN.

Place of Hindu Law in Comparative Jurisprudence.—Mr. S. G. Vesey-FitzGerald writes in reference to the note in the last number of the *Journal* upon his article in the *Law Quarterly Review* as follows:

"I entirely agree as to the immense importance of custom both in respect of its inclusion in the Shastras and in the commentators. But the issue is sometimes unduly fogged by a mistake for which Maine (*Ancient Law*, ch. i, *ad fin.*)—be it said with all due respect—is principally responsible. Whatever lapse of time and the reverence of generations may have made of them, the Shastras were not originally, and did not profess to be, Codes of Law; "Institutes," perhaps, but not Codes. True, they claim to be divine revelation; but only esoteric revelation, not like the law of Moses revelation intended for the nation at large. They are composed in the sacred language, never the language of the masses, and are intended as confidential instructions for the use of a hierarchy in administering (and incidentally reforming in a priestly direction) customs which are expressly stated to be sacred merely because they are custom. Nor do they confine themselves to Law, Morality and Religion; but range over the whole field of human activity, including, *e.g.*, strategy and Machiavellian Politics. If a western parallel is to be found for them, it is neither the Law of Moses nor the Twelve Tables, but a sort of cross between an Encyclopædia and a Masonic Ritual Book, with a dash of priestly infallibility thrown in.

"The distinction between 'moral precepts' and 'laws' enunciated by the Privy Council is, of course, merely part of the apparatus by which the rationalizing influence of English law has been brought to bear on Hindu law—an influence comparable to that of Roman law on English, or of Greek philosophy on Roman law, I agree that it is not to be found in Yajnavalkya or Narada; though one may suspect that those sages would have had a friendly feeling for so congenial a process of thought as an attempt to reform the law under the guise of explaining it. Whether that influence has always been wisely directed is of course a point on which opinions may and do differ. But the point on which I ventured with the utmost respect to criticise Jolly (and incidentally Maine) is slightly different. It is one of Maine's most brilliant flashes of insight that at a time when most inquirers were inclined to claim a fabulous antiquity for Manu he saw that that shastra (as we have it) represented a comparatively late stage of juristic development. Everybody now admits this to be the case; but Maine's disciples may strengthen his position by pointing out that the fusion of law and morality, where it exists, is evidence not (as Jolly erroneously led him to maintain)[1] of an early but of a late stage in the history of any system of law. It is not, I submit, the case that the *rishis* confuse law and morality; but they deliberately clothe their conceptions of morality with the binding force of law—just as, allowing for the difference of office and position, the Roman Prætor and the English Chancellor

[1] Contrary, of course, to the general tenor of Maine's teaching—S.V.F.G.

did at comparatively late stages in the history of their respective legal systems.

"Finally, may I dare to suggest another puzzle of the Shastras? Ideas which could only have been evolved by centuries of legal tradition are stated in as clear and concise a fashion as even Papinian or Lord Thring could have wished, side by side with stuff which no trained lawyer in any age could possibly have penned. Is it too wild a guess that the Brahmin counter-reformation may have overwhelmed a real school of law? Or is this contradiction due to the fact that a *rishi* would naturally not rise to prominence as a teacher under the Brahmin system until long years of religious austerity had more or less dimmed that practical and lawyerly outlook on life which he may have acquired during his period as a householder?"

Uniformity of Law in the United States.[1]—The movement in favour of uniformity of law throughout the United States of America is making sure, though slow, progress. From the latest information which is available it appears that there are now thirty statutes which have effect throughout the greater part of the United States, and although this may at first sight appear to be a somewhat modest achievement, it must be remembered that the process of placing these Acts on the statute books of the various States has called for legislative action on no fewer than 343 occasions! No further evidence is required of the formidable nature of the task which has been undertaken by those whose aim it is to minimize the conflict of laws which has been a fertile source of trouble in the administration of justice in the United States and has moreover carried in its train economic difficulties of no mean order.

As is only natural, progress has been chiefly in the direction of the unification of Mercantile Law, which lends itself most readily to the development of a process of assimilation. It is interesting to an English lawyer to observe that by degrees the different States are adopting Uniform Laws, the effect of which is to eliminate the difference between Negotiable Instruments and Documents of Title to Goods. The Bills of Lading and Warehouse Receipt Acts have been amended so as to give *bona fide* holders for value of these documents all the rights conferred by negotiability, so that they can acquire a valid title even from a thief or a finder.

Considerable progress was made at the National Conference of Commissioners on Uniform State Laws held at Minneapolis in August 1923. Although no Acts were finally adopted various draft measures were prepared and discussed, and it appears likely that many of the latter will be finally adopted next year. The proposed Acts deal with the unification of the law on various topics, such as Mortgages both of realty and chattels,

[1] "Progress in Passage and Formulation of Uniform State Laws," by Nathan William MacChesney, *American Bar Association Journal*, October 1923.

Guardianship of Infants, Trade Marks, Arbitration, Extradition and the Sale of Securities. It is interesting to note that an attempt is being made to unify the Law of Corporations, and that it is hoped that it will be possible to present to the Conference of 1924 a draft measure on this subject which, to use the words of the Commissioners, " will be practical, simple, comprehensive and at the same time in keeping with the advanced thought of public-spirited students of corporate problems and in conformity with the proper demands of present-day business necessity." A committee has also been formed to draft an Act to regulate the sale and purchase of firearms, in the hope that it may be possible in this way to alter the state of affairs which renders it almost impossible in the United States to prevent the criminal population from purchasing firearms as and when it pleases.

The value of the movement towards uniformity of law must not, however, be gauged by a mere recital of the adoption or approval of fresh measures. It is, as the President of the Conference of Commissioners has pointed out, an educational process which has a constantly increasing influence on public opinion, owing to the fact that it forces out into the open the discussion of many issues which otherwise would be shirked or remain buried in obscurity.

H. C. GUTTERIDGE.

Marriage and Succession in Spanish America.—Among the publications sent by the Instituto Ibero-Americano de Derecho Comparado of Madrid is *el Derecho de Familia y el Derecho de Sucesion* in Spanish America of the Conquest, its author being Dr. José M. Ots. This little volume is, for its size, most informative and contains mostly authoritative documents with extracts from the writings of Solórzano and others. The general intention as to the marriage law was to apply the system sanctioned by the Council of Trent and to encourage marriage with the natives, except that marriage was forbidden between officials and natives of the same district. Mulattoes, negroes and such-like were exempt from the necessity of parental consent, and were not bound by the restrictions caused by consanguinity and affinity, except within the second and first degrees of relationship respectively or when restricted by their customs. Although entire freedom to marry or remain single was the rule, there were circumstances in which marriage was obligatory in order to increase the population: as, for instance, in the *encomiendas* instituted in newly conquered districts—the *encomendero*, being the grantee of land and native labour, only had the concession on condition of marrying (p. 47). The faculty of constituting particular succession by way of primogeniture was allowed. The prohibition of separating the families of the labourers was decreed more than once, which shows that this law, in common with other protective laws, was apt to be disregarded locally. In the second part we again encounter the *encomienda*, a gentle word of entrusting, but which covered what was really a form of native slavery (at first

for the life of the grantee) intended to ensure due cultivation of the land granted to the immigrants. There was a subsequent relaxation of the limitation to one life; but always the concession was regarded as a ministerial grant and not as conferring a right of succession. The successor was bound to support his needy brothers and sisters, and his mother, unless she married again. The application of the ordinary Spanish law to this novel institution was a subject of much debate among the jurists, but has little value at the present time.

Many royal decrees are quoted which were intended to protect the property of the natives and the inferior clergy from the rapacity of the Church on the one hand and from the maladministration of the civil authorities on the other; and among these were some giving or acknowledging more extensive and simple testamentary powers in the case of the Indians (pp. 116–21) and others prohibiting death-bed benefactions to the Church (p. 123). The book concludes with a full consideration of the administration of the property of deceased persons.

WYNDHAM A. BEWES.

Japanese Legal Codes.[1]—Two pamphlets have lately reached this country, each the work of Dr. J. E. de Becker, and each a translation into English of a part of Japanese law which has been recently codified. The one is a translation of Japanese Jury Law (Law No. 75 of 1922), the other of the Code of Criminal Procedure (Law No. 50 of 1923).

The subject-matter of each is of interest to jurists, not only for its own intrinsic importance, but also by reason of the marked influence of the legal institutions of one nation, in this case England, upon those of another nation. There are certain features specifically Japanese in origin: we do not have far to seek for examples of the Japanese reverence for the family. Relationship in a remote degree is a valid reason for refusing to give evidence against an accused person, and it is forbidden to start criminal proceedings against one's father or mother, grandfather or grandmother, whilst on the other hand relationship is one of the qualifications for being nominated to assist an accused person during his trial.

But in the main it is English law and procedure which is to be found in these pages, and here the law reformer may find material for consideration: how far are departures from the English precedents improvements, and what further modifications might advantageously be introduced? It would be useful to know what influenced the Japanese Legislature in retaining or rejecting the English precedent; in those cases referred to above the reason is apparent, in others it is but a matter for conjecture. Here it is only possible to refer to a few of the more obvious points.

First, as to the provisions relating to judge and jury. It is enacted

[1] *The Code of Criminal Procedure of Japan.* Translated from the original Japanese text by J. E. de Becker, D.C.L. (Butterworth & Co., and Kelly & Walsh, Ltd.)

The Japanese Jury Law. Translated from the original Japanese text by J. E. de Becker, D.C.L. (Butterworth & Co., and Kelly & Walsh, Ltd.)

amongst other matters that the judge shall express no opinion as to the reliability or otherwise of evidence, or as to the criminal responsibility of the accused; that he shall give reasons for his judgment; and he has power, should he consider a verdict improper, to refer the case for re-hearing by another jury. The jury (and it is interesting to note that though the right of challenge is retained and in fact extended since there is no such distinction in Japanese law as that between felony and misdemeanour, there is no peremptory challenge) have larger functions than their prototypes here. They may examine witnesses, and they may discuss the penalty to be inflicted in the event of a verdict of guilty, and a majority verdict is all that is required of them.

Much that relates to procedure and that rests on custom in English law is of necessity the subject-matter of express statutory provisions in Japan. This may be instanced from the articles relating to the treatment of the accused person. Some provisions seem to tend in his favour, whilst it may be doubted whether an apparent relaxation of rules of evidence may not work to his disadvantage. It is expressly provided on the one hand that assistance, professional or lay, may be allowed an accused, that accused and counsel may "state their opinions," that the accused or his counsel shall have the last word, whilst Art. 135 of the Code of Criminal Procedure, dealing with the preliminary examination, runs in the translation: "Care shall be taken to treat the accused with courtesy and consideration, and an opportunity shall be allowed for making statements favourable to himself." On the other hand, it is provided by Art. 339 that if it be more convenient in certain instances the accused may be ordered to withdraw from Court during the hearing of evidence, whilst by virtue of another Article admissions may be permitted, at least so far as relates to documents. Again, whilst Art. 281 provides that after certain specified periods of time no public prosecution shall lie, yet in Japan it is not only possible but apparently common for a private action for damages to run concurrently with and incidental to criminal proceedings.

Regarding procedure reference may be made to the Japanese method of administering the oath. This, by Arts. 198 and 199, is to be written down, read over to the deponent and signed and sealed by him, while at the same time the nature of perjury is explained to him. It is to be wished that this method, involving as it must a certain deliberateness so often absent in our Courts, might be adopted here, where it would be further strengthened by the religious sanction which is absent from the Japanese oath.

Lastly, it is to be noted that the vexed question of professional secrecy is not left open to conjecture or argument, for Art. 187 provides in terms for the protection of the professional knowledge of not only lawyer and doctor, but also of minister of religion, dentist, chemist, midwife, and patent agent.

Whilst acknowledging the interest of these two pamphlets and the

debt owed to Dr. de Becker, it must be admitted that the usefulness of the pamphlets is limited by two factors—firstly by reason of the absence of any form of index, secondly by reason of the somewhat strained and unnatural language employed by the translator. The latter is the more grave defect, since those unacquainted with Japanese law at first hand (and for others a translation is unnecessary) must at times be left in doubt as to the precise meaning it is intended to convey. This is particularly so when what would appear to be an appropriate English technical term is abandoned in favour of a circumlocution. Is this meant to convey that on this point the Japanese law is a definite departure from its English precedent? In this connexion the following phrases may be quoted: "In this case he [judge] shall render the cause credible in writing." "In case there are two or more counsel [lawyers] these expressions of opinion in favour of the accused shall not overlap each other." "If the accused possesses no capacity of will." "Renewal of procedure." "Protocols of examination of witnesses." "Functionary of religion or worship." Such phrases, however, have the effect of calling for a greater attention to the subject-matter and perhaps are by that reason, at least in part, justified, for it should once again be said that the whole is of great interest and profit, and that a debt of gratitude is owed to Dr. de Becker for his work. M. G. C.

Doctrine of Capacity in Argentine Law.—Mr. Wyndham A. Bewes writes: From the point of view of the Society's *Journal*, the current number of the *Revista de Ciencias Jurídicas y Sociales* of the University of La Plata is distinguished by an exhaustive consideration of the doctrine of Capacity in Argentine law, contributed by Dr. Carlos M. Vico, Professor of Private International Law in the Universities of Buenos Aires and La Plata. The article, which is a print of a discourse, follows carefully and with great acumen the division of capacity into capacity in law and capacity in act, as exhibited, for instance, in the relation of pupil and guardian, husband and wife, recognizing full legal capacity in the wife and minor, though the acts are done or authorized by the husband and guardian respectively—a relation not differing in substance from the one adopted by Roman law. The dominant law in determining capacity in the Republic is that of the domicil, as we all know; though, curiously enough, capacity for marriage follows the law prevalent at the place of the celebration of the solemnity, even when the parties have resorted there to escape disabilities existing in their domicil.

The Capital Levy in Switzerland and Czecho-Slovakia.—The capital levy has for its predecessor the German and Austrian "Reichsnotopfer," according to which the citizens and not the inhabitants of these countries had to give up to one-fourth and even more to their revenue authorities. The laws were duly proposed and accepted in the respective parliaments, and had the declarations been made properly and conscientiously and the

date of payment not been delayed (*e.g.* by appeal, etc., against the taxation) until the rate of taxation had been considerably reduced, the results would certainly have been better.

The Czecho-Slovakian law of April 8, 1920, with regard to capital levy and tax on capital-increase had its origin in the same principles which prompted the " Reichsnotopfer," and the law was also discussed, drafted and accepted in the Parliament in Prague. The only important point of difference between the Czecho-Slovakian capital levy and the " Reichsnotopfer " is that, while the latter had to be paid principally by the citizens, the Czecho-Slovakian capital levy applies to inhabitants, or, in other words, to everyone who pays the Czecho-Slovakian ordinary income-tax.

The Swiss capital levy which was, on December 3, 1922, rejected in a popular vote by an overwhelming majority (710,000 to 105,000), is entirely different from the above-named Czecho-Slovakian law.

(*a*) It was only a proposal which never became law.

(*b*) The Parliament did not wish a capital levy, and, therefore, would not enter into its discussion. But, according to the Swiss Constitution, 50,000 citizens have the right themselves to draw up a draft of a law and to submit it without amendment to the popular vote. The Swiss capital levy is such a draft law, and was supported by 87,000 signatures—that is to say, about six-sevenths of the votes that were afterwards cast in its favour.

(*c*) It can therefore be readily understood from these facts that the Swiss proposal set out only the leading principles of a capital levy which were embodied in a few clauses, the details of which were by no means carefully worked out, and it was prophesied that some of these clauses, even when amended, would prove to be extremely difficult, if not impossible, to apply. The Czecho-Slovakian law, on the other hand, has been discussed in every detail, and covers about thirty printed pages.

A comparison, though only possible on broad lines, between the Czecho-Slovakian law and the Swiss draft law may be of interest. In both cases the tax is to be borne, not by citizens, but by inhabitants of the country. Individuals are allowed, in both countries, a certain minimum amount of capital, which is not subject to the capital levy, which minimum is increased according to the family of the individual. A difference arises, however, in the amount of the minimum, and the allowances to be made. In Czecho-Slovakia the minimum is 10,000 kr. with allowance of 10 per cent. for each child if the whole capital does not exceed 200,000 kr. and the income 8,000 kr. In Switzerland the minimum is 80,000 frs., with an allowance of 30,000 frs. for the wife and 10,000 frs. for each child. In Czecho-Slovakia the minimum amount is only free from tax when the whole capital does not exceed the minimum; should the capital exceed the minimum, then the entire capital is subject to the levy, while in Switzerland the minimum of 80,000 frs. is free of tax regardless of the amount of capital.

Companies in Switzerland were to pay without any allowances or

deductions 10 per cent. of their capital, while in Czecho-Slovakia the levy is claimed only from companies having a capital of over 200,000 kr., the minimum operating in the same way as for individuals, namely, 200,000 kr. being free from tax only where the capital does not exceed that amount.

The sliding-scale of the capital levy is also common to both laws, with the exception of Swiss companies as already stated. For Swiss individuals the sliding-scale is from 8 to 60 per cent. of the capital, while in Czecho-Slovakia it is from 3 per cent. to 20 per cent. Furthermore, the Swiss sliding-scale was to operate in such a way that the highest percentage applicable in a given case was chargeable on the entire capital subject to the levy, while in Czecho-Slovakia the levy proceeds in such a way that there is charged :

3 per cent.	up to a capital of	200,000 kr.
5 ,,	on a further	800,000 ,,
9 ,,	,, ,,	3,000,000 ,,
13 ,,	,, ,,	8,000,000 ,,
17 ,,	,, ,,	15,000,000 ,,
19 ,,	,, ,,	23,000,000 ,,
20 ,,	of all capital which exceeds the set out above.	50,000,000 kr.

The Czecho-Slovakian capital levy contains further provisions with regard to the privilege of insurance policies of the Czecho-Slovakian Landesfond—upon which taxes are not levied.

The tax up to 500 kr. must be paid in one sum ; if it is more than that amount, at 15 per cent. within 30 days after taxation and the remainder in six half-yearly instalments. The banks which are giving credit to enable payment of the taxes are guaranteed by the State against loss on such credits. Every point, and especially the calculation of the capital subject to the tax, in the Czecho-Slovakian law has been very carefully thought out. The Swiss draft law does not contain any such details.

With regard to the consequences of the Czecho-Slovakian law it must not be forgotten that this law was not a novel one to Czecho-Slovakia, succeeding, as it does, the above-named Reichsnotopfer with Kapitalfluchtgesetz which operated in and round Czecho-Slovakia. The conviction of the necessity of such taxes, to which they were more or less accustomed, and the national patriotism to help the new Home-Country by their payment, have produced in Czecho-Slovakia quite other results than the draft law in Switzerland, where it was considered a legal robbery. In Czecho-Slovakia the law has produced good results and especially an increase in the rate of exchange, but the mere proposal of the law has heavily damaged Swiss interests—which consequences are stated in my articles in the London Stock Exchange *Gazette* of December 7, 1922, No. 1145, p. 2710, in *The Times* of December 5, 1923, p. 8, and *Morning Post* of December 6, 1923, p. 12.

GEORG WETTSTEIN, *Zurich.*

The Prerogative Writs.[1]—There is probably no other living writer on English Law who can hope to compete successfully with Dr. Jenks in the art of putting his thoughts into clear, forcible and attractive phraseology. An article on Prerogative Writs is a case in point. Here in short compass we have a brilliant study of an extremely difficult and complicated subject, in which the theme is handled in such a way as to present all the essentials in a form which will appeal not merely to specialists, but to all who are interested in the history of our law.

Attention may, in particular, be directed to the writer's explanation of the origin of the Writ of Habeas Corpus. He points out that the earliest use of the Writ is in the Assize of Clarendon issued by Henry II, in 1166, where the sheriff is commanded to " have the bodies " of accused persons brought before the justices, at a time and place to be named by the latter. The messages sent to the sheriff in this connexion must soon have become a regular feature of every circuit of the King's judges, with the result that they would gradually acquire the name of writs. Dr. Jenks thinks that these messages ultimately crystallized into the later *Habeas Corpus ad respondendum.* It is an attractive theory, and supported as it is by the weighty authority of Dr. Jenks's opinion, it seems hardly too much to assume that it is correct.

Recent Social Legislation in the United States.[2]—The American attitude towards social legislation in years now past has been marked by great antipathy to any attempt upon the part of governments to provide for the injured and the indigent, but of recent years a new interest has been shown in such legislation. As it is probable that there will be a stronger tendency in this direction, it seems worth while to indicate what has been done in the past, and what the constitutional objections are which have been and will be encountered.

The two most recent pieces of federal legislation which attract attention are the proposed Towner-Sterling Bill,[3] which is an attempt at improving educational standards throughout the nation by means of federal subsidies, and the Sheppard-Towner Act,[4] by which federal aid is granted for maternity and infancy hygiene projects in the various States. Both of these statutes raise the same constitutional questions, which are three: (1) whether the funds secured by taxation may be used for the purposes in question; (2) whether there has been an unconstitutional delegation of legislative power to the States when they have been vested with the duty of administering the funds granted; (3) whether there has been an unconstitutional intermeddling with the rights which the States reserved for themselves upon coming into the Union.[5]

[1] By Edward Jenks, D.C.L., *Yale Law Journal*, April 1923.

[2] Reprinted from the *Columbia Law Review*, December 1923.

[3] This bill is still pending, and has not yet become a law. [4] 42 Stat. 224.

[5] For two articles discussing the problems raised by the Sheppard-Towner Act see Burdick, " Federal Aid Legislation " (1923), 8 *Cornell Law Quar.*, 324–37; Corwin, " The Spending Power of Congress " (1923), 36 *Harvard Law Rev.*, 548.

As to the first question, a long line of decisions seems to settle the point that it is within the power of the federal government to appropriate lands owned by it for use by the State in the promotion of education.[1] A somewhat different problem is involved when Congress seeks to raise funds to aid the States by means of taxation. In such a case, the legislators meet with an obstacle in that section of the Constitution which provides that "Congress shall have power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States."[2] This section from the very first provoked discussion as to its real meaning. One group contended that the scope of general welfare was limited to the powers specifically enumerated in other parts of the Constitution,[3] while the others held that its meaning was not to be so limited.[4] The decisions of the Supreme Court seem on the whole to vindicate the liberalist, for grants of federal financial aid to the States have been repeatedly held valid even though the funds were secured by taxation.[5]

There should never have been much doubt as to the validity of the contention that grants of federal aid involved an unconstitutional delegation of legislative power. Some early Supreme Court cases held that, while Congress could not delegate all of its legislative power, it was competent for it to delegate the administration of a programme decided upon by Congress.[6] This being so, it was quite obvious that Congress had acted within its powers in the two statutes under discussion, for, as has been pointed out, "In Federal Aid legislation Congress declares the purposes for which the money is to be used and leaves to the state agency the formulation of rules for the administration of the funds in conformity with the national design. Here there is clearly no unconstitutional delegation of legislative power by Congress."[7]

The recent case of *Massachusetts* v. *Mellon*[8] dealt a death-blow to the argument that legislation by Congress in aid of the States was an interference with States' rights. It had been contended that by forcing the States to comply with a fixed standard in order to obtain federal funds Congress had interfered with their freedom of choice; but Mr. Justice Sutherland pointed out that this was not true because the States had complete freedom as to whether they would accept the grant or not, and it was only when they chose to do so that they were bound to comply with a federal standard.

[1] *Campbell* v. *Doe* (1851) 13 How. 244; *Haire* v. *Rice* (1906) 204 U.S. 291; *California* v. *Deseret Water, etc., Co.* (1916) 243 U.S. 415.

[2] Art. I, s. 8, clause 1. [3] See *Federalist*, No. 41.

[4] Story, *Commentaries on the Constitution* (5th ed. 1891), ss. 923–7.

[5] *Massachusetts* v. *Mellon* (1923) 43 Sup. Ct. 597. See also *United States* v. *Realty Co.* (1895) 163 U.S. 427; (Sugar Bounty case) and *Wilson* v. *Shaw* (1906) 204 U.S. 24, 27 Sup. Ct. 233 (Panama Canal case).

[6] *Wayman* v. *Southard* (1825) 10 Wheat. 1, 42, 43; *Field* v. *Clark* (1892) 143 U.S. 649.

[7] Burdick, *op. cit.*, pp. 333–4. [8] See footnote, *supra*.

Turning now to state legislation, we find it difficult to deal with all of the important legislation at hand because of the varied types and subjects of statutes. It seems wise, therefore, to limit our consideration to mothers' pensions, old age pensions, pensions for the blind and other miscellaneous Acts of a similar nature.

Probably the earliest in point of interest outside of this country but here, was the old age pension legislation. In 1910 the nade itself felt in the United States for the first time, and n was appointed in New Jersey to investigate old age pensions.[1] w interest was manifested in this movement in America. oted old age pensions in an Act which was entirely satisfactory ntinued to stand with a few amendments until the present.[2] izona Act which was an initiative measure was so poorly it it was held unconstitutional.[3] The Act failed to provide od of administering the pension system, and when a taxpayer the constitutionality the Court held it invalid because "the lack of a clear statement of the means and methods of its enforcement, we think, must necessarily result in its defeat."[4] Another objection was that the mothers' pensions provided for in the Act were not limited to indigent mothers but were granted to all coming within certain requirements. In 1919 there was introduced to the United States Senate an old age pension bill which died in committee.[5]

Nothing further was done until the fall of 1922, when there was a new movement for old age pensions sponsored by the Fraternal Order of Eagles. This organization drafted a standard pension bill providing for a maximum pension of one dollar per day to be paid by the government contributions alone. This bill was introduced in more than thirty States[6] and finally passed with a few modifications in Nevada,[7] Montana[8] and Pennsylvania.[9] In Illinois the measure was defeated in the Senate by five votes, while in Massachusetts[10] the advocates of the bill did not succeed in having it passed, but did secure the appointment of a commission to investigate old age pensions. An initiative pension bill was voted on by Ohio, and appeared to have been defeated at the time of going to press. It is expected that the bill will be introduced again at the next session of the various legislatures in which it failed in 1923,

[1] *New Jersey*, 1910 Joint Resolutions, No. 1. [2] Alaska, Laws 1915, c. 64.

[3] Ariz., Acts 1915, initiative measures, p. 10. This Act abolished almshouses and provided for old age pensions to men and women over sixty years of age without visible means of support. Mothers' pensions were to be given to all widows who were mothers of dependent children, regardless of financial assets.

[4] *Board of Control* v. *Buckstegge* (1916) 18 Ariz. 277.

[5] 66th Congr. 1st Sess. S. 2803, by Mr. McNary.

[6] (1923) N.Y. State Legislature A. 200, by Mr. Lyman.

[7] Nev., Laws 1923, c. 70.

[8] Mont., Laws 1923, c. 72. This Act reduces the maximum pension from $1.00 per day to $25.00 per month.

[9] Pa., 1923, P.L. 141. [10] Mass., 1923, Resolve 43.

and it will be interesting to note the attitude with which it is met after other States have already made the venture.

The mothers' pension movement, which has met with almost universal success and favour in this country, originated elsewhere. In 1915 the American States entered whole-heartedly into the pension project, and Nebraska,[1] Wyoming,[2] Washington,[3] Montana,[4] Oklahoma,[5] North Dakota,[6] South Dakota,[7] New Hampshire,[8] Tennessee[9] and Nevada[10] all provided for the granting of such aid. Wisconsin in the same year made the adoption of mothers' pensions by all counties within the State compulsory.[11] New York provided for the organization of county boards of child welfare to grant allowances to widowed mothers with one or more children.[12] In 1917 six more States adopted such legislation.[13] The 1923 legislation marks the adoption of such pensions by Rhode Island[14] and North Carolina,[15] while New York extends the relief to mothers whose husbands are permanently incapacitated or confined to state institutions.[16]

There has also been some legislation granting pensions to the indigent blind. Fairly recently New Hampshire[17] and Maine[18] provided for financial assistance to needy blind persons who were not inmates of institutions, and at the same time Missouri[19] proposed a constitutional amendment authorizing pensions for the blind. The last proposal was finally adopted, and two years ago an Act was passed providing for pensions of not more than $300 a year to adult, indigent, blind residents.[20] By an Act passed in 1923 the application of the earlier statute is extended to those who have not been residents for ten years prior to making application, but who have become blind while residents of the State, and have remained within the State ever since that time.[21]

Turning now from legislation which involves taxation and the expenditure of public funds, we come to that which deals with the exercise of the police power. One of the earliest of these statutes was passed by New South Wales, in an Act empowering the Industrial Court, on the appli-

[1] Neb., Laws 1915, c. 187.
[2] Wyo., Laws 1923, c. 32.
[3] Wash., Laws 1915, c. 135.
[4] Mont., Laws 1915, c. 86.
[5] Okla, Laws 1915, c. 183.
[6] N. Dak., Acts, 1915, c. 130.
[7] S. Dak., Acts 1915, c. 251.
[8] N.H., Laws 1915, c. 132.
[9] Tenn., Laws 1915, c. 32.
[10] Nev., Laws, 1915, p. 151.
[11] Wis., Laws 1915, c. 637.
[12] N.Y., Laws 1915, c. 288.
[13] Mo., Laws 1917, c. 151; Tex., Gen. Laws 1917, c. 120; Ark., Laws 1917, c. 326; Ariz., Laws 1917, c. 70; Me., Laws 1917, c. 22 and W. Va., Acts 1917, c. 46. The Missouri law is interesting because of its application to prospective mothers as well as those who already have children.
[14] R.I., Acts 1923, c. 2340.
[15] N.C., Laws 1923, c. 260.
[16] N.Y., Laws 1923, c. 731. An interesting Ontario law requires that the recipient be the mother of at least two children living with her. Ontario, Acts 1920, c. 89.
[17] N H., Laws 1915, c. 94.
[18] Me., Laws 1915, c. 109.
[19] Mo., Laws 1915, p. 411.
[20] Mo., Laws 1921, p. 554.
[21] Mo., Laws 1923, p. 303.

cation of any employer of not less than ten clerks or on application of not less than ten clerks (1) to fix the minimum wage and rates for overtime payable to such clerks, to be based on what should be paid to the lowest class of efficient clerical labour, either generally, or in a particular class, and (2) to provide for a lower rate in the case of clerks who were aged, infirm or slow, and unable to earn the prescribed wage.[1] Shortly after this, Oregon passed an act providing for the fixing of minimum wages and maximum hours of labour for women and minor workers,[2] and this was held constitutional by the State Court as a valid exercise of the police power.[3] A flood of similar legislation soon followed. In 1915 California adopted a minimum wage law for women, and Arkansas also had a new law.[4] Idaho appointed a commission to investigate wages of women and minors and advise on the feasibility of establishing a minimum wage board.[5] Kansas passed an Act establishing an Industrial Welfare Commission, and making it unlawful to employ women or minors under conditions detrimental to their health or welfare or at wages not adequate for their maintenance, or for more hours than was consistent with their health and welfare.[6] Colorado, two years later, made its Industrial Commission a minimum wage board to fix a minimum wage for women and minors under eighteen.[7] Arizona fixed a minimum wage of ten dollars per week for women in certain industries, including stores and manufacturing establishments.[8] North Dakota also passed an Act applying to women and children under eighteen,[9] and in 1923 South Dakota followed suit in an Act establishing a minimum wage of twelve dollars per week, with power in the Industrial Commission to grant special exemptions for persons physically or mentally deficient.[10]

In view of the fact that this is an industrial country and of the progress made by other industrial nations along that line, it is strange that so little constructive legislation has been passed relating to unemployment. Up to the present time the only consideration given to this problem, which has occupied the attention of other nations to so great an extent, seems to have been either toward the establishment of state employment bureaux,[11] or, in rare instances, the provision of emergency public employment.[12] The insurance idea seems to have had very little effect upon the Legislatures, although it has made considerable headway among private employers. As the nation grows older it may expect

[1] New South Wales, Acts 1910, No. 19.
[2] Ore., Laws 1913, p. 92.
[3] *Stettler* v. *O'Hara* (1914) 139 Pac. 743, noted in (1914–15) 28 *Harvard Law Rev.* 89.
[4] Cal., Stat. 1915, c. 571. Ark., Acts 1915, c. 191.
[5] Idaho, Laws 1915, c. 136.
[6] Kan., Laws 1915, c. 275.
[7] Colo., Laws 1917, c. 98.
[8] Ariz., Laws 1917, c. 38.
[9] N. Dak., Acts 1919, H.B. 184.
[10] S. Dak., Acts 1923, c. 309.
[11] See (1915) Reports of the American Bar Asson., p. 663.
[12] Idaho, Laws 1915, c. 27; Mass. 1915 Resolve 2; N.J., Laws 1915, c. 43.

to come face to face with this problem, just as it is now realizing for the first time the old-age problem, and it is quite possible that with a decade there will be some legislation adopting the insurance system which has found so much favour with the European nations.[1]

It remains briefly to state the constitutional difficulties which will be encountered by the advocates of such legislation as this. These may be divided into those arising under the Federal Constitution and those encountered in the Constitutions of the various States. Two classic pronouncements of the Supreme Court have settled the point that the power of taxation, in order to be valid, must be exercised for a public purpose. The first concluded with the statement: "We have established, we think beyond cavil that there can be no lawful tax which is not levied for a public purpose."[2] But they went on to say that, in determining what is a public object, the Courts "must be governed mainly by the course and usage of Government, the objects for which taxes have been customarily and by long course of legislation levied." The second also proceeded upon the ground that the exercise of the taxing power would be forbidden by the fourteenth amendment unless it was used for a public purpose. But the Court in this case indicated that it would hesitate to question the determination of the local authorities as to whether the purpose was public or not. They said: "It is obvious, however, that what is a public use frequently and largely depends upon the facts and circumstances surrounding the particular subject-matter in regard to which the character of the use is questioned," and then went on to say how much better qualified the people of California were to pass an opinion upon this question than "anyone who is a stranger to her soil."[3] Another exceedingly important contribution was advanced by the Court in answer to the objection that the sole benefit went to the owners of the drought-devastated areas and hence the public benefit was inconsiderable and indirect. They replied: "It is not necessary, in order that the use should be public, that every resident in the district should have the right to the use of the water. . . . The use is public because all persons have the right to use the water under the same circumstances. This is sufficient." It seems, therefore, that the general attitude of the Court toward taxation for social purposes is much more lenient than its views on the exercise of the police power, of which so little can be said after the minimum wage decision.

It is generally much harder to get the State Courts to approve any social legislation, partly because of the various constitutional prohibitions which prevent such legislation, and partly because of the conservatism

[1] See for example (1911) 1 & 2 Geo. V, c. 55, which was replaced in 1922 by (1922) 12 Geo. V, c. 7; see also (1919) *Journal of Society of Comparative Legisl.*, p. 239; and Acts and Decrees of Denmark (1914) c. 80; Italy, L. Decree No. 2214, Oct. 19, 1919.

[2] *Loan Assoc.* v. *Topeka* (1874) 20 Wall. 655.

[3] *Fallbrook Irrigation District* v. *Bradley* (1896) U.S. 112, 17 Sup. Ct. 56.

of the Courts and their dislike for what they term paternalism.[1] Of course they also insist that the taxing power must be exercised for a public purpose. In *Lowell* v. *Boston*[2] the Court held unconstitutional a statute authorizing the city of Boston to issue bonds and lend the proceeds on mortgage to the owners of lands, the buildings upon which had been destroyed by the fire of 1872, because it merely benefited the individuals who owned the lands, and its effect upon the public welfare was indirect and incidental. " It is the essential character of the direct object of the expenditure which must determine its validity." It often influences the Courts favourably in doubtful cases to have the control and management of the benevolence in the hands of public officers,[3] and it may be stated as a fundamental principle that the aid must be granted to the indigent alone.[4] Indeed, an early Kansas case declared unconstitutional a statute providing for state aid to poor farmers in drought-devastated areas in order to enable them to purchase grain for seed because the recipients were not actually paupers.[5] A North Dakota case has held the other way on the ground that, while the farmers were not at the time paupers, they were in great danger of becoming such, if aid was not granted.[6] This case is one of the few which affords any comfort to the advocates of new social legislation, for it shows a benevolent attitude toward the new experiment. Some have tried to justify pensions by saying that since grants to private institutions for the care of the indigent have been sanctioned, pensions to the indigent themselves can be upheld. As has been pointed out, this conclusion does not follow.[7] Some difficulty will be found in justifying such grants as forms of outdoor relief.[8] It seems that although the Courts a decade ago were very much opposed to all forms of pensions, and did not hesitate to condemn them unqualifiedly, with the increased publicity and education on the subject there should gradually develop a new spirit of tolerance, which should aid the advocates of reform in receiving the judicial sanction for their works. If the judges prove to be impenetrable, there always remains a last instrument : the constitutional amendment, which is decidedly serviceable where there is really a strong sentiment in favour of the legislation.

[1] For constitutional difficulties, see *People* v. *Westchester County National Bank* (1921) 231 N.Y. 465 ; *State* v. *Dixon* (1923) 213 Pac. 227 ; see Constitution of New Hampshire, Art. 1, s. 36 ; see Constitution of South Carolina, Art. III, s. 32. A provision in Art. III, s. 18, of the Pennsylvania Constitution makes it necessary to pass pension bills under the heading of " Assistance."

[2] (1873) 111 Mass. 454.

[3] *Lucas Co.* v. *State* (1906) 75 Oh. St. 114 ; *White* v. *Inebriates' Home* (1894) 141 N.Y. 123.

[4] See *Lowell* v. *Boston, supra.*

[5] *State* v. *Osawkee Township* (1875) 14 Kan. 418.

[6] *North Dakota* v. *Nelson Co.* (1890) 1 N. Dak. 88.

[7] Goodnow, *Social Reform and the Constitution* (1911).

[8] See *Lucas Co.* v. *State, supra,* p. 136, and *State* v. *Switzler* (1897) 143 Mo. 287, 45 S.W. 245.

Creation of an Indian Bar.—The proposal to create an Indian Bar raises a number of important questions, some of which are of more than local interest.

The most important of these issues is the time-honoured controversy as to whether or no there should be a legal and recognized separation between the functions of counsel and solicitor. The tendency in India for years past has been manifestly in favour of the abolition of all legal impediments to the performance of the dual functions by either branch of the profession. In all probability the present controversy will end in the abolition of the dual system, in theory, at any rate. The experience of the Dominions seems to indicate that sooner or later the division of functions reappears in practice.

Another very important question, but one peculiar to India, is the possibility of levelling up all the grades of legal practitioners. At present, there are full-fledged barristers, European and Indian, Advocates who have practically the same rights of audience as barristers but who have not been called to the English, Scottish or Irish Bars, High Court Vakils and Pleaders, Mofusil pleaders, Mukteears, etc., etc., solicitors and attorneys. There is considerable difference of opinion as to the desirability of putting all these on the same level; and not a little danger that the interests of the community may be lost sight of amid the clash and jar of conflicting interests.

Two other vital points will require very careful handling. The first of these is the determination of the composition and powers of the body to be invested with disciplinary powers. Are these powers to be placed in the hands of the Bar when constituted; or to be left with the judges of the High Courts; or to be confided to a mixed body? Further questions arise as to whether this body when constituted should be entrusted with the education of, as well as the admission and disbarring of, all legal practitioners.

These are all matters of the greatest importance to the future well-being of the administration of justice in India, but it seems likely that the most heated controversy will arise when the decision has to be made on the respective merits of an all-India central Bar, controlling the whole legal profession from the Himalayas to Cape Comorin, and of a series of Provincial Bars having local jurisdiction only. This particular problem is being involved in the larger political problem of the future of Centralized *versus* Provincial Governments in India; and is likely to be made a test of the respective strengths of the opposing parties. Whatever may be decided it is likely that for some time to come the added prestige of a call to the English Bar will attract a considerable number of Indians to our Inns of Court.

Annual Report of The President, Columbia University.—The report for 1923 of the President of Columbia University is written in Dr. Nicholas Murray Butler's pungent and lucid style. It is illumi-

nated by a number of interesting aphorisms. To quote only a few of them:

> Mediocrity wars upon scholarship. It mistakes footnotes for learning, lack of imagination for logic and security for consequence. The scholar works always in an intellectual space of not less than three dimensions, while both the seeker for immediate practical results and mediocrity work constantly in flat-land.
>
> It is debatable, and often debated, to what extent the present-day student is interested in scholarship. He is certainly curious for information, and by reason of his defective training is often surprised by the obvious and astonished at the well-known.
>
> It is certainly true that the world is not standing still. . . . It would appear to be logically possible to conceive the present active changes as backward moving instead of as forward moving; but when mankind as a whole comes to that point of view one would not wish to be responsible for the results, not alone to our civilization but to our lives.

The most interesting innovation of the year, described in the Report, is the institution of the degree of doctor of law (*Doctor Juris*) to be conferred upon the completion of advanced work and research in the field of public and private law. This encouragement to post-graduate work is a matter for congratulation. With the rapidly increasing number of new statutes, with the growing unwieldiness of judicial precedents, with the changing of our fundamental legal conceptions, there is a real demand for competent and, if possible, for inspired textbook writers. As President Butler says:

> The recent literature of the law, whether judicial or academic, offers abundant evidence that new conceptions of legal process and legal determination are being developed in response to the rapidly changing political, economic and social conditions of modern life.

The modern law school is not meeting its full responsibilities if it only trains those students who are to become practising lawyers. It must also appeal to those students who, sacrificing the more concrete rewards given to the man at the Bar, are willing to devote their lives to the study and elucidation of the law.

Before establishing the degree of Doctor Juris the Board of Trustees declared it to be the definite policy of Columbia University to confine the degree of doctor, when given in course to reward the completion of advanced instruction and research, to the four traditional academic groups and the four historic university faculties of law, medicine, theology, and philosophy. By thus limiting the multiplication of degrees it was felt that a definite stand would be taken against the "general breaking up in the field of higher education in the United States." By the rapid increase in the number of higher degrees given in some American univer-

sities an impression has been created that these degrees are of no particular distinction. The stand taken by the Trustees of Columbia University is therefore a welcome one.

There is one more point in the Report which particularly strikes the reader, especially if he is a member of an English university. John Stuart Mill has described envy as " that most anti-social and odious of all passions." It is difficult, however, not to be envious upon reading that the gifts made in money alone to Columbia University during the past year amounted to $12,728,021.59.

A. L. G.

" Revista de Derecho Internacional."—Mr. Wyndham A. Bewes writes: The September number of the *Revista de Derecho Internacional* of Habana is distinguished by articles by Señor Bustamante, Mr. Charles E. Hughes and Mr. Robert Lansing, as well as one by Señor Osuna on Venezuela and the Law of Nations.

Señor Bustamante in his informative article on the Permanent Court of International Justice and its working takes occasion to correct the idea, common in this country, that article 59 of the Statute forbids a decision of the Court to be cited as a precedent. This is, in fact, partly an erroneous interpretation. The article really adopts the continental system of treating a *res judicata*, which, as a case decided and executed between parties, affects no one but those parties ; but there exists besides the juridical doctrine arising from the grounds of the decision and from the rules of law accepted and laid down therein, which are authoritative as precedents (p. 41). The writer anticipates the collaboration of the United States, upon which it may be necessary for the Tribunal to have two sessions in the year, one in Europe and one in the United States. By the way, is not " Tribunal," as much used in other countries, a more fitting *nomen* than " Court " ?

Mr. Lansing writes on the proposed consolidation of the ambassadorial and consular systems, as designed in what is known as the Rogers bill, which passed in the House of Representatives last session. The new Foreign Service would have several categories, the members of which would be interchangeable and promoted by merit. " Nowadays," he says, " embassies and legations are more and more entrusted with questions of commerce, finance and industry, which most diplomatic secretaries are little acquainted with and for which they are even less capable. We must assume that our future relations with other nations will be chiefly of an economic nature, and the men who serve this country as diplomatists must be as learned in these matters as the consular officials are at the present time. Formerly, the division between commerce and politics in foreign affairs was clear and precise ; but now this line has almost totally disappeared." Following the same reasoning, Mr. Hughes, in his article on the working of the Foreign Office of the U.S.A., advocates in one paragraph the union of the two services. When two such dis-

tinguished public servants agree, we may expect the result which they desire and which seems generally approved.

International Labour Legislation.—The International Labour Office has published in two brochures [1] the laws and orders passed or made by thirty-three of the nations subscribing to Part XIII of the Peace Treaty. The volumes are arranged in a clear and serviceable form. They are provided with an admirable index to countries and to subjects, whereby information can readily be obtained as to the progress made by the countries, whose laws are included in the volumes, in giving effect to the regulations and recommendations adopted by the International Labour Conference. There are also included the more important international covenants and agreements, as, for example, between France and Belgium in regard to miners' pensions; Italy and Switzerland, unemployment benefit; Belgium and the Netherlands, accident insurance; and Italy and Brazil, emigration and employment. To all the laws and orders it is impossible to refer in any detail, but one broad fact stands out: the very definite tendency there is, under the influence of the International Labour Organization, on the part of less progressive countries to bring their industrial and labour legislation up towards the standards of the more progressive nations. Mexico, torn as it is by internal dissensions, has found time to pass an act providing for conciliation and arbitration in industrial matters. Iceland has provided for seamen's accident insurance, Rumania has established employment exchanges. Some countries, such as Czecho-Slovakia, have legislated very freely with the object of improving the conditions of industrial service; but it is difficult to make selections from such a large number of acts and orders. The United States of America, which has never proceeded very far in the direction of "mass treatment" in public health, is showing signs of departing from its old tradition, and Congress has passed a law making provision for maternity and infancy welfare. Needless to say, unemployment and unemployment insurance play a considerable rôle amongst the subjects of legislation. Those who have hoped that the International Labour Office would play a potent part in humanizing the conditions of the workers throughout the civilized world will find justification for renewed optimism in this record showing part of what has been accomplished during the year 1921.

Index of Current Legislation in the United States.—The December, 1923, number of the *American Bar Association Journal* notes that an effort is being made to secure the preparation and publication of an index to the various Federal and State laws passed in the United States "on matters of general public interest." The American Association of Law Libraries, under whose responsibility the invaluable *Index to Legal Periodicals* is issued, has already approached the Librarian of Congress with the suggestion that the work be undertaken by the Library of Congress.

[1] *Legislative Series*, vol. ii, 1921. Parts 1 and 2. (International Labour Office, Geneva.)

Before the New York State Library suffered the disastrous fire of 1911 an Index and Review of Legislation of all the States was published annually in one of the Bulletins issued by authority of the Director. Nothing later than the *Review* for 1908 has been printed, though the material for the years 1909 and 1910 had been collected and was ready for printing when the fire occurred, in which it was destroyed. With characteristic energy a fresh start was made and the years 1909 to 1912, inclusive, have since been prepared and held ready for printing. It is greatly to be regretted that the authorities have not been able to secure the funds necessary to print and continue this important work, for, in 1915, the Director of the State Library definitely decided, for this reason, not to proceed further with the preparation of the *Digest and Review*. The fact that nothing of a similar nature has since been prepared by anyone else in the United States has created a situation of extreme difficulty for all those interested in the study of comparative law. Miss Gertrude E. Woodard, who is a member of the Committee responsible for the production of the Index to Legal Periodicals, is easing the situation, to some extent, by the publication of a loose leaf index to legislation, under the auspices of the Bureau of Government of the University of Michigan. Though this effort is worthy of commendation it still falls far short of atoning for the loss of the excellent review previously provided by the New York State Library. It is, therefore, earnestly to be hoped that the necessary funds may be forthcoming, and that the proposed revival of this most useful work by the American Association of Law Libraries may be attended with the success which it deserves.

Maintenance Orders.—It is officially announced that Orders in Council have been issued extending the Maintenance Orders (Facilities for Enforcement) Act, 1920, to the Overseas Territories named below. The Act provides for the enforcement in England and Ireland of maintenance orders made by a Court in any part of His Majesty's dominions outside the United Kingdom or in any British Protectorate to which it extends, and the Legislatures of the undermentioned Territories, to which it has now been extended, have made reciprocal provisions for the enforcement therein of maintenance orders made by Courts in England and Ireland: Union of South Africa (as from November 1, 1923), Bahamas, British Honduras, St. Helena, Norfolk Island.

The operation of the above-mentioned Orders in Council is confined to England and Northern Ireland, and similar provision has not yet been made as regards the Irish Free State by the Government of that State.

NOTICES OF BOOKS.

FEDERAL AND UNIFIED CONSTITUTIONS.[1]

Professor A. P. Newton, of King's College, London, has in the volume before us made a most valuable addition to the collections of original documents available for the use of students of political institutions.

There can be no doubt that the federal principle, introduced into the practical politics of the modern world by the States of North America in 1789, is one of growing importance. It is probable that by means of it some of the most difficult problems both of the British Empire and of the world at large will reach solution in the future. It provides, in short, one of the readiest methods for reconciling the desire of small communities for autonomy with the need of large communities for purposes of external politics and defence.

That being the case, it is extremely useful to have this collection of documents illustrative of all the leading examples of federal union recorded in history. Professor Newton (ignoring the various leagues of ancient Greece) begins with the federations or quasi-federations derived from the mediæval Holy Roman Empire. Of these the most important were the Lombard, Rhenish, and Hanseatic Leagues; the Swiss Confederation, and the Burgundian Duchy which developed into the Republic of the United Netherlands. Professor Newton provides us with the constitutions of the Perpetual League between the Three Forest Cantons, 1291, and the Union of Utrecht, 1579. It may be noted, in passing, that Unterwalden appears as Untenwalden on page 8, while Zug is presented as Lug on page 9.

Next, as preliminary to the federal constitutions of modern times, he furnishes the terms of the temporary confederation effected by the New England Colonies in face of the Indian peril in 1643, and also—as an example of the transformation of a personal union into a real union—the Act of Parliament which amalgamated the separate kingdoms of England and Scotland into the realm of Great Britain.

All this is preliminary. The real business of the book begins with the American Revolution in 1776. From this date the main constitutions dealt with are: (1) the American, 1789; (2) the Helvetic, 1815;

[1] *Federal and Unified Constitutions: A Collection of Constitutional Documents for the use of Students.* Edited, with an Historical Introduction, by Arthur Percival Newton, M.A., D.Lit. Pp. viii + 444. (Longmans, Green & Co. Price 15*s.* net.)

(3) the Confederate States, 1861; (4) the Canadian, 1867; (5) the North German Confederation, 1867; (6) the German Empire, 1871; (7) the Commonwealth of Australia, 1900; (8) the Union of South Africa, 1909; and (9) the German Republic, 1919.

To this valuable assortment of documents Professor Newton supplies an excellent historical introduction running to forty pages. He discusses the nature of federalism, coming to the conclusion (p. 17) that its essence is "the separation of the powers of government over a particular community, some of the powers being placed in the hands of one authority and some in another, so that both cut [? act] concurrently on the citizens, but each has its own sphere of action." He points out in an interesting manner that federations come into existence in two very different ways, and that all existing federations show evident marks of their mode of generation. Some are formed by the union of States originally separate and distinct: such are the United States of America and the German Empire. In these cases the constituent States retain all the residual power not expressly surrendered to the central government. Others are formed by the disintegration of unitary polities, *e.g.* the Canadian Federation. In these cases the central government retains all the residual powers not expressly surrendered to the newly constituted members. Enough has been said to show the great interest and importance of Professor Newton's able and laborious work.

F. J. C. Hearnshaw.

A HISTORY OF COMPANY LAW.[1]

Mr. Formoy has written a straightforward account of the historical development of the law of commercial companies in England. He has not digressed into those speculations over the legal theory of corporateness which attracted Maitland and which form the subject of one of Sir F. Pollock's recent *Essays in the Law*. His story, plunging *in medias res*, begins with the year 1600, when the East India Company obtained its first charter of incorporation; it ends with the Companies (Consolidation) Act of 1908. In travelling this period of three centuries two convenient landmarks are the South Sea Company crisis in 1720, and the Companies Act of 1844 when Parliament first allowed incorporation by registration. At these two points, and indeed all along the road of nineteenth-century company legislation, Mr. Formoy provides safe guidance. Within the limits which he has set to his journey, he is not concerned to discuss future changes in the law which at the moment are being much canvassed. Starting as he does with the convenient date of 1600, he also excludes any description of the evolution of our overseas trading companies from the Merchant Adventurers and the putative descent of the latter from the London Company of Mercers. Otherwise he might have had more

[1] *Historical Foundations of Modern Company Law.* By R. R. Formoy, LL.B., 1923. (Sweet and Maxwell. 10*s.* 6*d.* net.)

to say of the manner in which the conception of an "adventurer" or shareholder was at first (in the East India Company, for instance) coloured by old ideas of the admission to membership or "freedom" in a body like the Mercers. Notions of the ready transfer of shares, for example, were postponed while the East India Company discussed the question whether "adventures" should be "sold unto any but brethren of the company." It was the rule at first that if any outsiders ("any that are not free") bought shares, "they must buy their freedom before they can have any adventure."

Mr. Formoy's narrative is well compressed. His statement that the East India Company first traded with a joint stock in 1612 perhaps would have been the better for expansion. The early voyages from 1600 onwards were conducted on a joint stock basis even if the adventure was wound up annually. He disclaims any idea that the preliminary part of his book is either exhaustive or recondite; but, though he has made no great exploration himself, he is on solid ground in following Dr. W. R. Scott. The book will well serve its purpose of supplying an introduction to the Act of 1908.

C. T. C.

MINING LAWS IN SWAZILAND.[1]

MANY people still living will remember that, prior to the South African War, Swaziland had become a sort of Naboth's Vineyard in relation to the Transvaal, and also the constant announcement of "concessions," granted in rapid succession to speculators by the Swazi chief in return for payment, or gifts in kind only too often quite out of proportion to the value of the concessions purported to be granted. However, the war having ended, the Transvaal was for a time in charge of a Governor appointed by the British Government, and in June 1903 an Order in Council was promulgated directing the Governor to administer the country and to legislate by proclamation.

Naturally enough, the first problem which presented itself to the New Administration was found in the multitude of "concessions" granted by the Swazi chief to all sorts and conditions of persons from the eighties onwards. The date of the Concessions Commission, under the hand of the Governor of the Transvaal, is stated in the "Introductory" as 1890, or nine years before the occurrence of the Transvaal War, instead of 1904, possibly due to an error in the press.

The Commission reported in 1906, and for the most part concessions were expropriated, a sad blow to the multitude of concession hunters, whose hopes of material gain at little cost were thus incontinently destroyed.

[1] *The Mining Laws of the British Empire and of Foreign Countries.* Vol. III.: South Africa; Part II: Swaziland. (London: Printed and published by His Majesty's Stationery Office. 1923.)

As showing the growing importance of mining in Swaziland, a brief "General Introduction" by Sir Richard A. S. Redmayne, the Chairman, and Lord Morris of St. John's, the Vice-Chairman, of the Imperial Mineral Resources Bureau, decided to issue the present volume next after that on the Transvaal, already noticed in these pages, as well as for the further reason that the laws of the Transvaal and Swaziland are very intimately connected. The Legal Committee points out how diversified the law relating to mining really is, "and how practically impossible it has hitherto been for those whose business it is to deal with mining questions to be acquainted with the law of mining throughout the Empire," and the hope is expressed that as the work develops difficulties hitherto felt by mining experts will be overcome, and suggestions which those interested may care to make will be carefully considered.

The work, which is well edited by Mr. Gilbert Stone, appears next after that on the Transvaal because, as the "General Introduction" points out, the law of the two countries is very intimately connected and also because mining in Swaziland shows signs of an increase in importance, and at an early date volumes dealing with the law of Ontario and a part of the Empire of India, respectively, may be expected.

Mr. Stone may be congratulated upon the production of a careful and full compilation in chronological order of the proclamations, ordinances and laws relating to a great industry of prime importance.

H. T. Tamplin.

WAR-TIME LABOUR LEGISLATION IN GREAT BRITAIN.[1]

Mr. Cole has written two illuminating and able books; no one who is struggling to unravel the war-time industrial legislation in Great Britain can afford to overlook them. At the beginning of the war the outlook and aspirations of the workers were described by most industrial historians in terms that were fast becoming stereotyped, but the war let loose new forces of industrial opinion which had previously found little free play, and that only in certain esoteric circles.

In no sphere of industrial activity was this more apparent than in the field of organization and administration of the great trade unions. In *Workshop Organization* Mr. Cole describes the rise in Great Britain of the new "workshop movement" which really voiced the protest of the workers against the over-centralization and cumbrous working of the old trade-union machine, although in some instances under the direction of extremists it became definitely iconoclastic and revolutionary. It rapidly grew into a flowing tide with which not merely the trade unions' executives but the Government had to reckon. It compelled all respon-

[1] *Workshop Organization*, by G. D. H. Cole, xvi + 186 pp. 7*s*. 6*d*. net. *Trade Unionism and Munitions*, by G. D. H. Cole, xii + 251 pp. 7*s*. 6*d*. net. (Oxford: Clarendon Press. Carnegie Endowment for International Peace.)

sible for trade union organization to reorientate their older view of trade-union orthodoxy. The scheme of works, district and national industrial councils recommended by the well-known Committee on the Relations between Employers and Employed, over which the Right Hon. J. H. Whitley, now Speaker of the House of Commons, presided, attempted, and with great success, to give expression to many of the sentiments underlying the movement. The various laws and orders now being passed by countries which have subscribed to Part XIII of the Peace Treaty, providing for the creation of somewhat similar works, district and national industrial councils register an advance in the same direction.

In *Trade Unionism and Munitions* Mr. Cole narrates the history of the special war-time legislation in Great Britain, providing for the avoidance of disputes, the regulation of wages, suspension and subsequent restoration of trade-union customs and practices, and other matters of war-time industrial controversy. This book deals with some highly controversial subjects, and Mr. Cole has drawn the raw materials for his history—and he quite frankly says so—from the records inevitably more or less partisan of the trade unions. That gives the book a special value. Because, from the trade-union point of view, the course of the war-time legislation is carefully detailed, copious references are given to the official documents, and the road is clearly indicated for those who wish to pursue the subject further. But it must be remembered that in regard to the questions of fact involved and the issues of principle that are raised there is another side to the story which Mr. Cole does not, and, indeed, working from the limited material at his disposal, could not give. If one seeks to follow the history of those strenuous and stormy times as it appeared to one who is fortunate enough to have at his disposal, not merely trade-union records but those of the employers' federations, and also the official minutes of Government departments, he has to turn to the admirable work recently published in the same series, Mr. Humbert Wolfe's *Labour Supply and Regulation*. The distinguished author of this book was the official head of the Labour Regulation Department of the Ministry of Munitions, and therefore in a unique position for ascertaining and discussing the three, often conflicting, interests affected by emergency labour regulation during the war: those of the trade unions, the employers and the Government. He does it in a dispassionate and detached manner, and has produced a treatise which is not merely authoritative but most eminently readable.

L. M.

THE EQUALITY OF STATES.[1]

In this book, reprinted from articles in the *Columbia Law Review*, Dr. Goebel gives a sketch of the historical background of the doctrine of equality of States in international law, and a short analysis of the nature

[1] *A Study in the History of Law*, by Julius Goebel, Jr., LL.B., Ph.D., Associate in International Law, Columbia University. (New York: Columbia University Press, 1923. Humphrey Milford, Oxford University Press. 7*s*. net.)

of the doctrine as it has existed in modern times. Within the compass of 89 pages he has managed to cover a vast range of history, tracing the changes and developments of the philosophical and juristic conceptions of legal and political relationships. Starting with the Stoic philosophers, the reader is guided down through the ideas of Roman jurists, Christian theologians, teachers and rulers in the Middle Ages, preachers and politicians of the Reformation, to the theories of the exponents of modern ideas of international law and the status of political communities.

We are living in an age in which statesmen and students and people of public spirit in all countries are having to apply their minds to problems of immense difficulty and importance in the systematic definition and organization of international relationships. A bird's-eye view of some of the underlying ideas and principles that have held sway in past times, both ancient and modern, should be a useful equipment for the practical handling of problems of this character. Such a bird's-eye view this book ably affords.

The author has not confined himself entirely to the description and discussion of ideas and philosophical or juristic theories, but introduces various interesting sidelights from the actual doings of political personages and communities at certain stages of European history. One lesson these sidelights seem incidentally to convey is that the development of political and juristic theories is largely guided by, but often lags a good deal behind, the actual practices of men. From this we may deduce that the best way to secure in the future a system of international law that will exercise universal and undisputed authority is to promote in the present the widest possible extent of international co-operation in dealing with actual affairs in which nations have a common interest.

It is perhaps rather a matter for surprise that the author does not appear, anywhere in these pages, to have taken the opportunity of dwelling on the importance of the place occupied by habit and custom in giving to law both its substance and its authority.

F. N. K.

THE CONSTITUTION OF CANADA.

Mr. Justice Riddell's lectures,[1] delivered in 1923 at Columbia University, aim at bringing out the essentially democratic character of the constitution of Canada, despite the traditional monarchical form of the government. Apart from their immediate object, they have a more general appeal as a result of the elaborate notes which illustrate and support the statements of the text. The exposition is, of course, of great interest and value as representing the views of one immediately engaged in the interpretation of the Dominion Constitution. Points on

[1] *The Canadian Constitution : in Form and in Fact*, by the Hon. W. R. Riddell, LL.D. (Columbia University Press, 1923.)

which divergence of view is possible necessarily often present themselves, and some of these are of sufficient interest to deserve mention. The term "British Dominions" can hardly be said (p. 62) to have ceased to mean "territory under the dominion of the British Isles," and now to denote "Dominions possessed by the British people within the borders of the Dominions themselves"; it means now, as before, territories appertaining to the British Crown. To style Canada as in international law only a dependency of Britain (p. 61) is clearly to overstate the case, nor is it accurate to claim the Fisheries Treaty of 1923 as negotiated without the intervention of the British Ambassador (p. 70), through whom in point of fact the communications between Canada and the United States passed.[1] The Colonial Conference of 1887 was not one between Prime Ministers, as are the Imperial Conferences, but a miscellaneous gathering. The provinces are denied (p. 4) the power of instituting the initiative and referendum, but this view must be regarded as dubious, having regard to later pronouncements of the Judicial Committee than that relied on by the author.[2] The reservation of Dominion bills is twice discussed (pp. 29, 46), but nothing is said of the alternative procedure of the insertion of suspending clauses in bills, which would otherwise require reservation. The House of Lords has ceased to be the Court of Appeal in the case of the Irish Free State, and it seems more than dubious to claim (p. 49) the disappearance of the Coalition in 1807 or of Lord Melbourne's Ministry in 1834 as instances of the dismissal of Ministries by the Crown; the last genuine case is the famous instance of 1784. Nor does the British North America Act lay down any general rule as to the duration of provincial legislatures (p. 33). It is curious also to find the rigorous rule in Canada (p. 29) which disapproves reservation of a provincial bill by a Lieutenant-Governor on the advice of his ministers. Dominion practice generally would have suggested that the procedure might be perfectly legitimate; it is true that ministers are responsible for legislation, but when that legislation may invade a sphere forbidden on one ground or another to the province, considerations of convenience would seem to dictate the propriety of reservation rather than disallowance.

A. Berriedale Keith.

STUDIES IN COMPARATIVE INDUSTRIAL LAW.[3]

These two monographs which have been published in the series issued by the "Institut de Droit Comparé de Lyon," furnish a new and valuable contribution to the comparative study of the Anglo-American law relating

[1] See this *Journal*, vol. v, pt. iv, pp. 161 ff.

[2] See this *Journal*, vol. iv. pt. iv, pp. 240 f.

[3] *Le Boycottage devant les Cours Anglaises*, by René Hoffherr. Pp. 180. (Paris: Marcel Giard.)

La Lutte Judiciaire du Capital et du Travail, by Professor Lambert and Dr. Halfred C. Brown. (Paris: Marcel Giard.)

to Trade Disputes. The third volume in the series, *Allen* v. *Flood*, by M. Fouilland, has already been reviewed in the *Journal*,[1] and M. Hoffherr on the one hand, and Professor Lambert acting in collaboration with Dr. Brown on the other, have now brought the matter to completion in the form of two critical studies of the attitude taken up by the Judiciaries of France, England and the United States, when dealing with problems arising out of Labour disputes.

M. Hoffherr deals with the English case law subsequent to *Allen* v. *Flood* and more particularly with the speeches of the Law Lords in *Quinn* v. *Leathem*, of which a very careful and accurate translation into French is printed in the appendix. He emphasizes the value to a French jurist of a study of these cases owing to the fact that in France such expedients as boycotting, blacklegging, picketing and the like are still in an embryo stage on account of the absence in the case of French trade unions of the strong sense of vocational solidarity and discipline which has brought matters to a head in England. He then proceeds to review the development of English case law relating to the boycotting of employers at the instance of trade unions, and brings into relief the division of judicial opinion into two schools of thought which he terms the repressive and the abstentionist points of view. It is interesting to note that he ranges himself on the side of the latter, on the ground that in his opinion the decisions, of which *Quinn* v. *Leathem* is the chief representative, constitute a breaking away from the policy of the law as exemplified in the various Trade Union Acts. He comes to the conclusion that the present state of the law, which he finds to be uncertain and contradictory, arises largely from the fact that the English judges, in dealing with questions of this kind, have, instead of applying the precedents of earlier decisions in a logical manner, on certain occasions consciously or unconsciously subordinated legal considerations to those of statecraft and public policy. He appears, however, to have overlooked the fact that, in dealing with the activities of trade unions, the English Courts have had the difficult task of defining the duties of an anomalous legal entity which is neither incorporate nor unincorporate, and which in many respects is above the law. It is this fact which to a large extent explains an attitude on the part of the English Bench which M. Hoffherr finds illogical and unreasonable. But his book contains much illuminating and suggestive criticism of the way in which this very difficult problem has been handled by our Courts, and he is to be congratulated on a very thorough and well-thought-out piece of research work.

The joint work of Professor Lambert and Dr. Brown deals solely with the development of the law of the United States relating to boycotting. The term "boycotting" is used by them in a narrow sense, *i.e.* to denote measures adopted by combinations of workers to prevent third parties from dealing with employers. The year 1908 is taken as the starting-point as it is the date of the decision in the case of *Loewe* v. *Lawlor* (28

[1] Third series, vol. v. pt. i, p. 138.

Supreme Court Reporter 301), in which boycotting of the type in question was declared to violate the Sherman Act as being in restraint of interstate commerce and traffic. The authors trace the development of what they term the judicial campaign against trade unions from this point down to the present time. They point out that no other system of jurisprudence has placed at the disposal of employers such a varied arsenal of weapons as that which is furnished by the law of the United States. The Sherman Act, the protection of proprietary rights by injunction, the law of conspiracy, and the law relating to inducements to breach of contract have all in turn been requisitioned for this purpose. In England the Trade Disputes Act has prevented the mobilization of these legal doctrines against the activities of the trade unions, but the interpretation given to the Clayton Act by the Supreme Court of the United States has resulted in the complete paralysis of a measure designed to achieve the same purpose. The principal decisions which have been operative in bringing about this state of affairs are carefully and acutely analysed by the learned authors of the work under review, which is a contribution to the science of Comparative Law of the very greatest value. In conclusion, it is impossible to refrain from congratulating Professor Lambert once again on the very high level of excellence attained by the series of monographs which is being published under his fostering care. English lawyers are in particular awaiting with impatience the publication of the promised volume dealing with the life and work of Maitland.

H. C. GUTTERIDGE.

THE FOUNDATION OF LAW.[1]

To the series of volumes issued by the Editorial Committee of the Association of American Law Schools has been added one of carefully chosen extracts from the works of jurists and sociologists of repute. It succeeds in giving a very satisfactory review of those few vast human philosophical conceptions on which the infinite details of the laws are based. The writers range from Jeremy Bentham and Herbert Spencer to Havelock Ellis and J. A. Hobson.

It is somewhat distressing to realize that, although this is the fourteenth volume of this Modern Legal Philosophy Series, it appears to be only the second which contains anything by an English writer. The rest, except one, are all translations of the jurists of Continental Europe. Whether it be a calamity or not, there is no denying the fact that the English mind does not give much time to considering the fundamental principles of law. We have built up one of the two great legal systems

[1] *Rational Basis of Legal Institutions.* By various writers. Editorial Committee of the Association of American Law Schools. The Modern Legal Philosophy Series. (Macmillan & Co., 1923, pp. 1 + 603.)

of the modern world ; but, on the whole, it has been a somewhat hand-to-mouth proceeding, and we have not wasted many moments in explaining our methods or our reasons. Our jurists have been craftsmen, rather than theorists. It may be that our law is all the better for that fact.

Nevertheless, there is surely plenty of time for a good deal more philosophical discussion in this very matter-of-fact country. As a race, we must really take a more active and dignified part in the condensation of the general principles on which our practical life is based. We are inevitably compelled (whether we realize it or not) to work and live according to some general philosophy of existence, and it would be better if we had a rough idea whether our philosophy in any way fits into the laws of logic and sound sense. This volume from the United States is an admirable first textbook ; it gives us a broad view of the ground that has been covered, and which needs still more tilling. It is particularly acceptable at this moment when the political situation has raised a vast crop of problems which cannot be left—as far too often they are at present—to the somewhat clumsy handling of partial politicians, or to the still more serious mangling by journalists, generally lurid before they are precise.

This book endeavours to gather together the arguments for or against such fundamental principles as Private Property, Collectivism, Individualism, Contract, Succession of Heirs, the Family and its many aspects, and so on. They are all very difficult to understand. Mankind has come to rough-and-ready decisions concerning them ; but, from the very fact that these decisions have been so varied in different places, it is clear that it is by no means certain that the truth has been reached. The ultimate truth may be that there is no absolute truth, but only a variable truth for varying circumstances : private property may be right in one place and wrong in another, for example. But, in any case, these are all very important questions, and the answer, or answers, must not be left to the biassed decision of successful millionaires or unsuccessful paupers. This book is an attempt to apply the methods of philosophers.

The whole volume is well worth careful study. The essay on the Principles of *Laissez Faire* by President Jethro Brown of the Adelaide Industrial Court is a good example of the value of the finely trained and widely experienced mind applying itself to problems of practical life. It is a fine statement of the case, put into a very short space. It is impossible to discuss the whole book in any detail here ; its ground is so wide. As a guide to the reader it may be said that it is grouped into the five parts of Liberty, Property, Succession, Family, and Punishment. There are very few of the big problems of current affairs that are not discussed under one or other of these fundamental principles of human society.

G. R. Stirling Taylor.

THE ROMANCE OF THE LAW MERCHANT.[1]

Mr. Wyndham A. Bewes, the author of *The Law of Waste* and *Stock Exchange Law and Practice*, and who is well known for his distinguished work in connexion with the International Law Association, has just written a most attractive and scholarly book entitled, *The Romance of the Law Merchant*. The Right Hon. Sir Richard Atkin, Lord Justice of the Court of Appeal, has contributed a sprightly and stimulating foreword. The author's object was to explore the origin and growth of the law merchant and thereby provide an introduction to the study of international and commercial law. He has done so most admirably, and has combined with it a graphic description of the commerce and fairs of the Middle Ages in connexion with which the law merchant played such a prominent part. The title may be unconventional, but there never was a title to any book more truly appropriate. We hear nowadays much of the romance of trade and the romance of commerce; little of the romance of law. Mr. Bewes has certainly succeeded in producing a book as full of human interest as of legal erudition. In the law merchant he shows that there is no lack of romance for the student, the lawyer and the general reader, in fact for all who take interest in the wonderful evolution of laws and institutions too often accepted in the modern world as conventionally commonplace.

Part I deals with the law merchant and its history, and is obviously the product of ripe learning and wide research. The more or less generally accepted view that the law merchant arose in Italy in the central part of the Middle Ages, was chiefly founded on Roman law and was carried by the traders of that country into the numerous countries which they visited is contested by the author, and plainly with justification, who assigns to the law merchant an earlier and more Eastern origin. He points out that the commercial renaissance in the Mediterranean was due to the Crusades and the direct intercourse of the Italian and other nations with the marts of the Levant and the Black Sea. Then, when the western merchants captured the eastern trade, is it improbable, says the author, that they adopted almost as of course the well-accepted customs according to which that trade had been conducted for ages previously? Amongst these customs there figured prominently the habitual practice of the merchants throughout the then commercial world—that is to say, the law as applied between merchants themselves when concerned in mercantile transactions. Contrary to the common notion, the author holds the view that little of the law merchant was really derived from Roman law; he offers the opinion that it mostly sprang from the usages of the great fairs, "the true and transcendental spring from which flows the present law of the merchants."

[1] *The Romance of the Law Merchant*, by Wyndham A. Bewes, LL.B. (Sweet & Maxwell, London. Pp. ix + 148.)

The two distinctive elements in the merchants' law as enforced by their own class were good faith and despatch. Both were essential to trade, especially in mediæval times. But to the contemporary English common law the necessities of trade were not regarded as of pressing moment. The antipathy that existed between the law merchant and the old common law is discussed with great lucidity. The latter profoundly objected to two principles on which the merchants of all countries set great store—"negotiability" and "grace." Negotiability whereby certain choses in action, for example an undertaking to pay, pass from hand to hand like cash on delivery. Malynes writes (*Lex. Merc.*, p. 70):

> And herein you are to note that in the buying by Bills it may be made payable to seller or to the bearer thereof, and so all the parties are bearers thereof unto whom the same is set over by tradition of it only, and this is called a rescounter in payment used among merchants beyond the seas. . . . The common law of England is directly against this course; for they say there can be no alienation from one man to another of debts because they are held choses in action.

The common law refused to recognize grace. Under its inflexible doctrine a man must perform on the day he undertook that he would perform unless he had the promisee's consent. But the custom of merchants allowed, indeed the exigencies of trade demanded, days of grace, the number varying at different markets.

On pp. 19–22, Mr. Bewes enumerates succinctly and with perspicacity the distinctive elements of the law merchant, the most important being the admission of vocal evidence to contradict a written document where the sum in dispute was above 100 livres; the passing of property in the thing sold without the necessity of delivery; the unpaid vendor's lien; the competency of a partner as agent for the partnership with regard to third parties—some of these principles being derived from Mohammedan law—the limited partnership; the treating of an ordinary paid mercantile agent as a mere piece of machinery without vesting in or imposing upon him any independent rights or liabilities; the admissibility of books of account as evidence on proper proof of regularity; the legality of interest.

Mr. Bewes then goes on to deal with the contract of sale, and offers some illuminating observations on the principle that sale in market overt of a moveable confers a good title on the *bona-fide* buyer, showing clearly the origin of and need for this axiom of the law merchant. The practice of the law merchant in regard to the finance of commerce, bills of exchange, paper money, etc., is exhaustively examined; the genesis of insurance described, and the circumstances in which shipping documents came into being, discussed. How many practising lawyers realize, as Mr. Bewes shows, that our limited partnership is merely a descendent of the partnership *en commandite*—a creation of the Mohammedan law?

There is unfortunately no space to follow Mr. Bewes through his

most interesting account of the functions and procedure of the various classes of consuls: the itinerant consuls who travelled with their compatriot traders and judged their differences; the permanent consulate which formed a commercial court, and the other categories, all of which are fully described, as are also the fair courts of Pie Powder.

The second part of the book contains a most readable account of the fairs and of the course of trade in the Middle Ages, without some knowledge of which no one can attempt to understand the fundamental principles of the law merchant. Several most useful chapters are devoted to the study of the commercial customs of Venice, Genoa, Spain and Portugal, and of England, all of which have in varying degrees left their impress upon the law merchant.

Mr. Bewes is to be congratulated on having broken away from the convention which unfortunately seems to limit the writing of readable and interesting legal textbooks, a tradition which tends to divorce the active principles of law from the needs and circumstances of human life and activity which give these principles point. Too often vital legal principles become, in such an atmosphere of isolation, dry and barren postulates. We are too seldom presented with a book which connects up legal principles with the throbbing life of the busy world and explains their contribution to the progress of civilization. Mr. Bewes's book makes one feel how much law owes to business, and business owes to the law. It is of engrossing interest, and of prime importance both to the student and the practising lawyer—a book that will be welcome not merely in Great Britain, but in all the great commercial countries whose codes or systems of law are debtors—and how few are not?—to the old-time "law of merchants."

LYNDEN MACASSEY.

The following books have also been received:

Primitive Ordeal and Modern Law. By H. Goitein. (Allen & Unwin, Ltd., London, 1923.) 10*s.* 6*d.* net.

The Life and Reign of Edward the Fourth. By Cora L. Scofield, Ph.D. 2 vols. (Longmans, Green & Co., London.) 52*s.* 6*d.* net.

The Constitution of the German Republic. By Heinrich Oppenheimer. (Stevens & Sons, Ltd., London, 1923.) Pp. vii + 260. 10*s.* 6*d.* net.

Supreme Court of Judicature Accounts of Receipts and Expenditure, 1922–23, *H. C.* 134. (H.M. Stationery Office.) 3*d.* net.

European Impressions. An Address by Otto H. Kahn, November 15, 1923.

Dumping: A Problem of International Trade. By Jacob Viner. (The University of Chicago Press, Chicago, 1923.) Pp. xiii + 343. $3.00.

Lee's Introduction to Roman-Dutch Law, Corrigenda and Addenda, 1923. (Clarendon Press, Oxford.) 2*s.* net.

The Saar Controversy. By W. R. Bisschop, LL.D. The Grotius Society Publications. (Sweet & Maxwell, Ltd., London, 1924.) Pp. v + 186.

War and Armament Taxes of Japan. By Ushisaburo Kobayashi, D.C.L. Carnegie Endowment for International Peace. (New York: Oxford University Press, American Branch.)

The following periodicals are also received: American Bar Association Journal; American Economic Review; American Journal of International Law; American Political Science Review; Aperçu Statistique du Commerce Extérieur de la République Tchécoslovaque; Bolletino della Emigrazione; Bombay Law Reporter; Bulletin de la Société italienne pour les Etudes de Droit industriel; Bulletin de l'Institut Intermédiaire international; Bulletin mensuel de la Société de Législation comparée; Bulletin officiel du Congo Belge; Bulletin statistique de la République Tchécoslovaque; Calcutta Weekly Notes; Canadian Bar Review; Columbia Law Review; Edinburgh Review; L'Egypte Contemporaine; Headway; Hindustan Review; Instituto Ibero-Americano de Derecho Comparado publications; International Labour Office Bulletin; International Review of Agricultural Economics; L'Italia che Scrive; Journal du Droit International; Journal of the Parliaments of the Empire; Juridical Review; Law Quarterly Review; League of Nations Journal; Madras Law Journal; Revista de Ciencias Juridicas y Sociales; Revista de derecho jurisprudencia; Revue de Droit International et de Législation comparée; Revue International de la Croix Rouge; Social Sciences Quarterly; South African Law Journal; Studi di Diritto Industriale; University of Illinois Studies in the Social Sciences; Wisconsin Law Review.

CITY MANAGER GOVERNMENT IN AMERICAN MUNICIPALITIES.

[*Contributed by* H. W. Dodds, Esq., *Editor, National Municipal Review—Secretary, National Municipal League.*]

Englishmen visiting in the United States often express surprise at the degree of attention which the American people pay to the form of municipal government. We seem constantly to be revising our charters, experimenting with one form of organization after another in an effort to discover the magic charm which will automatically bring us ideal administration. Thus we invite the charge that we are excessively devoted to political theorizing, forgetful of the practice, and that we try to compensate for long years of political indifference by periodic frenzies in which we undertake to expel unprofitable municipal servants by rebuilding the whole structure, unaware that in the course of time it may again become inhabited by the former dwellers, more or less correctly termed "The Machine."

The charge would be well founded if it were true that there exists a fund of citizen interest, similar to the wage fund of the earlier economists, and that every unit of popular energy expended in charter framing left so much less to be burned up in operating the system efficiently. The truth is, however, that the opportunity to revise the form has increased interest and participation in the content. Citizen interest grows by what it feeds upon. A city enjoying a large measure of home rule becomes for local purposes a constituent body. Within specified limits it escapes the bondage of the State Legislature. Being responsible for the form of organization under which it operates, it cannot escape responsibility for the manner in which its self-made mechanism works.

Home Rule Powers lead to Charter Activity.—American charter activity is a direct outgrowth of municipal home rule. Home rule means the right of a city to frame and adopt its own charter subject to the limitations of general law. At present fifteen States concede

such authority to their cities by constitutional grant.[1] In addition, several other States have optional charter laws under which a city can decide by popular vote to accept one or another type of local government as drawn by the Legislature.

The power of a city to determine its form of government by vote of its people has directed much study to problems of municipal organization, and has led to wide variety in detail. In the main, however, three standard forms have emerged, viz. the strong mayor plan, the commission plan, and the city manager plan. The strong mayor plan provides for a small council [2] as the legislative authority, with full executive power vested in the mayor, such as the power to appoint and remove department heads except in some cases in which they may be separately elected.[3] The commission form concentrates both legislative and executive powers in a small board, usually five in number, called the commission. Each member becomes the head of an administrative department subject to the will of the board, and the board is supposed to co-ordinate the administrative policies of all departments. The city manager form retains the popularly elected council as a legislative body, but eliminates the mayor as the chief administrator, and substitutes a city manager, chosen and removeable by the council.[4]

Extent to which Manager Plan has been adopted.—There are at present 321 cities in the United States under the city manager plan. Of these, 246 have it written into their charters and 75 have adopted it merely by ordinance passed by the city council. The weakness of the ordinance plan is that it may be repealed at any time by the council, whereas a change in a charter requires action either by the State Legislature or a vote of the citizens. The ordinance method, therefore, lacks the stability of the other, and does not necessarily represent a thorough-going popular acceptance. The position of the executive is apt to be weak against political influence.

Dayton, Ohio (population 152,000), was the first important city

[1] The State of Pennsylvania (one of the fifteen) has as yet been denied the exercise of the right because of the failure of the Legislature to agree upon enabling legislation to put into force the constitutional amendment adopted in 1922.

[2] Usually from seven to thirty members, not varying, however, in proportion to population of the cities. New York has seventy-one members on its board of aldermen and the Chicago city council has fifty.

[3] Under the mayor form the mayor usually has a provisional veto upon the acts of the council. Under the commission and manager forms he does not have such power.

[4] The best single description in compact style of the prevailing forms of American municipal government will be found in volume one of *Municipal Government and Administration*, by Prof. W. B. Munro, of Harvard University.

to adopt the manager plan, although two smaller cities had placed it in operation a little earlier. It was adopted in Dayton shortly after the disastrous flood of 1913 had created an emergency with which the existing government, honeycombed with politics and inefficiency, was wholly unable to cope. The movement for a manager charter under Dayton's home rule powers had commenced before the flood, but its adoption was hastened thereby.[1]

Almost five million people live in manager cities in the United States, the largest city being Cleveland, Ohio, with a population of about 800,000; and the smallest McCracken, Kansas, with a population of 491. The latter pays its manager a salary of $2,400 per annum; Cleveland's manager receives $25,000 per annum. Manager cities are scattered throughout 35 States. The heaviest adoptions have been in the south and west, partly because of a greater willingness to adopt new schemes which appeal to their judgment, and partly because of less strongly intrenched professional politicians, who are invariably opposed to the manager system. The States of California, Florida, Texas, Oklahoma, Michigan and Ohio lead in the number of adoptions. Only four cities which have adopted the manager form by charter have abandoned it, although the number of ordinance cities which have reverted has been considerably larger. As shown above, the ordinance method is unstable.

What the Manager Plan is.—The intention of the city manager plan is to replace the politically chosen executive, either mayor or commission, with one chosen on the basis of administrative ability, and to relegate politics to the elected council, where it properly belongs. To the city manager are entrusted the selection and dismissal of all his chief subordinates, free from any legal interference by the council. Frequently the rank and file of municipal employees are protected by civil service provisions, but no such protection extends to the heads immediately under the manager. The council itself, unlike commission government, does not engage directly in administration. The council passes local laws and authorizes expenditures. If it is dissatisfied with any aspect of the city's administration it brings it to the attention of the manager, who must make good or get out. The conscious model in the minds of those who developed

[1] Dayton's manager charter went into effect January 1, 1914. Staunton, Virginia (population 10,600), passed an ordinance in 1908 creating the office of city manager. Her first manager is at present manager of Stockton, California, and one of the three highest salaried of the profession. Sumter, South Carolina (population 9,500), was the first to adopt a city manager charter. This was in 1913.

the system was the business corporation. The board of directors becomes the council, the general manager becomes the city manager. The democracy of the new plan consists in the immediate and continuous responsibility of the manager to the council, the elected representatives of the people.

Americans have not been easy to convince on this last point. Fear of a strong executive has been an integral part of our political philosophy. George III and the Kaiser have figured prominently in charter campaigns as historic warnings against what a city manager may become. Autocracy is the most effective mental stereotype utilized by hostile opponents in charter campaigns.

Nevertheless, the manager has steadfastly refused to develop into an autocrat. In some cases he has fallen short of exercising a proper degree of executive initiative and decision. A manager tending to overreach his authority can be quickly checked ; but the manager who fails to give the administrative organization and the council the necessary amount of the right sort of leadership is a more difficult problem. While full authority over the administration of municipal services (excepting schools) is given to the manager, full responsibility for bad use of authority is his also. And this responsibility has been enforced many times.

Aims of Manager Government.—The city manager plan is a deliberate effort to gain two ends which experience demonstrated has not been attained by other forms. The first is to eliminate state and local politics from municipal administration by setting up an operating manager who will not owe his selection to his political activities. The strong mayor and commission plans have failed to accomplish this. The mayor and the commissioners are elected, sometimes on a non-partisan ballot, sometimes not. In any case, they are in office by popular vote through the help of their friends. As executives they have patronage to dispense. Of course, every intelligent person knows that there is no democratic or republican way to buy fire-hose or administer a police force once the policies have been determined ; but few seem willing to abandon their claims to special consideration from an executive whom they have actively helped to be elected. The manager idea is to take the selection of the actual administrator out of politics.

The second end in view is to concentrate the responsibility for municipal administration in the hands of one person, and that person an expert. Neither the mayor plan nor the commission plan recognizes the expert. The advocates of the manager plan believe

that there is an art of management of government as there is of private industry. Everyone is familiar with the modern development of the management factor in business, and municipal affairs are largely concerned with business matters. Managership in business is now a distinctly recognized profession, requiring special aptitude and training. The industrial manager must be born to it, and the same is true of the municipal manager. Lord Haldane has emphasized that the apt person can be taught a science of administration, and unquestionably its importance is bound to increase as government takes on more and more functions which have in the past been left to private enterprise.

But, as others have pointed out for English readers, the political traditions of America with respect to recognition of the specialized nature of management are unfortunate. We have tolerated the spoils system. " To the victor belong the spoils " sounds like a fine sporting proposition, but it doesn't keep taxes down or engender trust in the government as a going concern. Yet it is almost a truism that competent expert or administrative ability cannot be had through popular election, and English cities have realized this for years. Our mayors and commissioners have been chosen on political grounds, on issues of public policy or personal popularity. Individual integrity has often figured in elections, but administrative ability rarely. In every campaign many issues outrival administrative capacity in the people's interest, and will continue to do so. The crowd, which is competent, in democratic theory, to pass an opinion on political questions, is not competent to select a technically qualified administrator. Few of our mayors have been naturally born administrators, and fewer still have had any experience to fit them to become such.

The manager plan is further designed to meet a glaring defect in commission government. The latter, originating in 1901 in Galveston, following the tidal wave which swept away a large part of the city, was conceived as a sort of board of receivers to take charge of a bankrupt city. Regarded at first as an emergency measure, its success in rehabilitating Galveston so impressed the people that almost five hundred cities adopted it. As against the extreme diffusion of powers generally occurring in American cities twenty-five years ago, commission government represents a desirable simplicity and concentration of responsibility. Its weakness lies in the absence of a single co-ordinating administrative authority. It is administration by a board, and a board of amateurs at that.

As someone has remarked, boards are long and wooden, especially when the members are chosen for the ability to win elections and not to administer. For the last few years it has been losing ground. In comparison with the commission plan the strong mayor and council plan (to be distinguished from the older American system of a weak mayor with administrative responsibility diffused among many separately chosen officers and boards) gives us gratifying results from the standpoint of concentration of power and responsibility, but still retains the political and often amateurish administration.

What has the Manager Plan accomplished?—The plan can scarcely be said to be more than ten years old, and it is obviously impossible to predict what its ultimate success will be. Its spread to-day, however, is more rapid than ever.[1] High hopes have not brought disillusionment, as has been the fate of commission governments.

It has accomplished the unification of administration, under a full-time chief executive. This has brought more intelligent budget methods, more economical purchasing, better co-ordination of the wide variety of municipal activities, and better personnel management. It has increased the responsibility of the executive because the manager must accept the blame for bad administration, nor can the council shirk responsibility for retaining an incompetent manager. With respect to administration, the manager plan believes in putting all your eggs in one basket and watching the basket.

Statistical comparison of the efficiency of manager and non-manager cities is as yet impossible. We have no concrete units of measurement of municipal service; our accounting systems vary widely; comparative tax rates are meaningless because of extreme diversity in local conditions, types of service and tax assessment methods. Competent observers, however, agree upon certain broad accomplishments of cities under manager rule. True, other cities have demonstrated progress, some of them marked progress, but the dead level of manager cities as a class is higher. More intelligent budget methods accompany the adoption of the plan. Whenever the city is not prevented by state law, better tax and assessment methods are introduced. The city's indebtedness, also, is placed on a sounder basis. In these three respects our cities have been notoriously lax, and the first manager taking office in a new city is usually faced with a bad financial situation. Floating debts

[1] The number of cities adopting the plan by charter or ordinance, for the past five years, is as follows: 31 in 1919, 39 in 1920, 50 in 1921, 41 in 1922, 50 in 1923.

representing deficits of past administrations, delinquent taxes, inequitable appraisement of property for taxation, impoverished sinking funds, outstanding debentures with the public works they represent long since outworn, give the new manager plenty to occupy his time. Although sound financial policies are possible without a city manager, the managers as a class have fine standards of fiscal administration and their results have been excellent. Floating debts have been wiped out, and the budgets have been made to balance. This is an obligation imposed by common honesty upon a city government, but is one which many officials of the old type do not care to face.

Manager cities have led in public improvements and attention to social welfare. This frequently involves larger budgets and increased taxes not always offset by economies due to greater efficiency; but the tax-payers seem to demand more and more of their cities, and do not begrudge the money if they believe it is not being wasted.

A recent referendum among chambers of commerce in manager cities revealed the business man's universal satisfaction with the new form.

City Manager as a Profession.—The city manager plan of government challenges the American tradition that any amiable gentleman can be a successful public administrator. The managers are building a profession. Qualifications, technical and non-technical, are being developed. The City Managers' Association holds annual meetings and publishes a monthly magazine; and some insight to the movement can be gained from a study of the profession.

Executive ability and tact in dealing with the public are the chief personal qualifications. With respect to previous training, engineering leads all other occupations. While the advantages of an engineering training are clear in the case of the smaller cities, men who are not engineers have had conspicuous success in small places. In the larger cities all qualifications fade in comparison with the ability to manage men. Business ranks next to engineering in the order of previous experience. About 75 per cent. of the managers have had previous public service in some form. Several universities and the training school of the National Institute of Public Administration offer courses specially adapted to prospective managers. As yet, however, but few managers have availed themselves of such training.

As is to be expected in a new occupation, the turn-over has been

high. Successful managers have received rapid promotion, due largely to the accelerated rate at which cities have been accepting the plan. Moreover, the profession has attracted the usual amount of misfits because of loose job specifications ; but this is not alarming, inasmuch as the position represents such a sharp break with tradition. Nevertheless, a substantial majority have " made good " in their posts.

As suggested above, the opportunity for advancement has been good. Some managers have received as many as four promotions to larger cities at better salaries. Practically all charters permit the city council to select a manager who is not a resident of the city when appointed ; and, in spite of strong American prejudice in favour of a local man, the hope of promotion to a larger city is one of the strongest the manager has. It is very common to select an out-of-town man as the first manager, although the following manager is apt to be a local person. Nevertheless, the specific provision in many charters that the manager need not be a resident of the city when appointed, and the frequency with which non-residents are chosen indicate a recognition of the professional character of the post.

America is proverbially frugal in compensation of public servants, and manager salaries are far from standardized. Only fifteen cities pay salaries of as much as $10,000 a year ; but it must be remembered that only sixteen have a population of as many as 50,000.[1] A city of 10,000 can expect to pay between $4,000 and $6,000 for a competent man, and a city of 50,000 between $7,500 and $10,000. A comparison with salaries received in the engineering profession is very favourable to the managers.[2]

The City Manager and Politics.—The future of the profession depends upon its being kept clear of politics. The political organizations have ravenous appetites, and will not give up a local office so powerful as that of city manager without a severe struggle. It is my belief that universal suffrage impels the great political parties to elaborate local organizations, because local campaigns and local patronage assist in maintaining the national organization. Where the suffrage is limited the tendency towards extensive local machines is not so strong. American cities still suffer, although not to such an

[1] Present indications are that the movement is spreading to larger cities. In this connexion the experience of Cleveland will be closely watched.

[2] For an interesting discussion of this and other points see " City Managership as a Profession " Supplement to *National Municipal Review* (New York), for July 1924.

extent as formerly, from the injection of national politics into local elections. Active local politics is not undesirable. It is desirable, however, that local politicians relate themselves to local issues. The local non-partisan ballot, which keeps all party designations off the ballot, assists to this end.

But politicians fatten on the spoils of administration, and the question is whether the manager has been able to keep them away from the feed-box. To date he has been successful, although the odds have been great. He has had to resist attack from many angles, and not infrequently it has been of a disgusting, personal nature.

The average manager strives not to become a political issue. The wise manager seeks not to become involved in questions of policy which it is the business of the council to decide. Nevertheless, it is very difficult for him not to become so involved. The council looks to the manager for suggestions as to public improvements and for stimulation towards civic betterment. In other words, the manager must have a policy himself, and when he finds his council enthusiastic for it but indolent in " selling " it to the public, it is a great temptation, not always conquered, to go out and " sell " it himself. And even if he does not campaign for his programme, the people, who instinctively recognize his powerful position, are apt to include him in any policy, even other than administrative policies, of which they disapprove. The manager is something less than the mayor of a city under the mayor form of government, but he is something more than any single official in an English city. In fact, there seems to be no other city official in the world strictly analogous to him. It is difficult for him to keep in the background, because at any moment a question of pure administration, as, for example, the discharge of an incompetent assistant, may be made a political issue by those seeking to defeat the re-election of the council or even to abolish the manager plan entirely.

In remote cases the city manager has become an election issue. In some cases politics has dictated palpably unfit manager appointments. Sometimes reasonably fit appointments have had a political aspect, and it may be that the manager will become more of an issue in councilmanic elections. An election in which candidates opposed to the old council have been successful will often involve the discharge of a manager who, because he was acceptable to the old, is not desired by the new. It is unquestionably true, however, that the manager plan has removed pea-nut politics from municipal administration to a degree never attempted

by any other form tried in the United States. It has educated millions of people to the differences between the place of politics and the place of administration in municipal government, and has enabled the selection of the central administrative head to be based upon professional fitness.[1]

[1] A subject worthy of a separate article is the relationship of the expert administrator to the public. Obviously it differs from the relationship of an industrial manager to the stockholders of a corporation. There is danger that those who concentrate on efficiency in governmental operation will overlook the public contact aspects of their task. The attitude that he will do his best to run the city and let the people "take it or leave it" will not bring success to a manager. The better managers realize that the people must know what the city is doing and why, and that abstract or statistical evidences of efficiency are not enough. The manager's task is, therefore, a hard one, and mob psychology is a subject in which he should be well versed.

NOTES ON IMPERIAL CONSTITUTIONAL LAW.

[*Contributed by* PROFESSOR A. BERRIEDALE KEITH, D.C.L.]

The Dominions and the Treaty Power.—The unfortunate misunderstanding with the Dominion of Canada over the Treaty of Lausanne has had the admirable result of elucidating in a very satisfactory manner the attitude of that Dominion regarding treaty questions. It is now clear that, for reasons which are not public property, though they are well known, the Dominions were not invited to be separately represented during the negotiation of the Lausanne Treaty. The step was clearly a concession to difficulties raised by France, and was a distinct derogation from the position attained by the Dominions at the Peace Conference of 1919, at that of Washington in 1921, and ascribed to them in the League of Nations. The decision that the British representatives at Lausanne were to be confined to Lord Curzon and the High Commissioner at Constantinople did not evoke any formal protest from Canada, which acted on the ground that it must be assumed that Canada was not invited to be represented on the score that the matters at issue had not the same direct interest for Canada as those dealt with at Versailles. When, however, the Dominion Government was formally requested to notify concurrence in the ratification of the Treaty, it immediately declined to accept any responsibility in the matter. The ground for refusal was not any suggestion that the Treaty as signed did not apply to the whole of the Empire, or that Canada was not bound by ratification in the King's name; it was, however, argued that Canada could not be expected to take any active responsibility under the Treaty since she had not been asked to send a representative to consider its negotiation, and from this position Mr. Mackenzie King has in no way receded. The Dominion is admittedly bound by the Treaty, but the Dominion Parliament has not been asked to approve its ratification, the Dominion Government has declined to express its approval, and has left the responsibility to the British Government. Canada, there-

fore, is under no obligation if any question should arise of action under the Straits Convention of affording assistance in maintaining the position of the Straits.[1] The justice of this position seems to be admitted generally by Canadian opinion, the only criticism addressed against it being rather to the effect that Canada should have protested against any exclusion and should have maintained her right to equality of status with the United Kingdom in all treaty matters.

The Dominions and the London Conference.—To some extent the validity of this criticism appears to have been conceded by Mr. Mackenzie King in view of his effective refusal to permit the ignoring of the distinct personality of the Dominions in regard to the London Conference on Reparations. The episode marks the decisive rejection of the idea of permitting the British Government to stand as the representative in foreign affairs of the Empire, even on the understanding that it will consult the Dominions and endeavour to concert action with them, which in effect was the proposal for dealing with the matter pressed on the Dominions by the British Government. The protests of Canada, as ever prominent in enforcing the rights of the Dominions, resulted for the London Conference in a compromise[2]; representation for the Dominions and India was secured on the basis of a British Empire panel, on which a Dominion or Indian representative was included, while representatives of the Dominions and India were, when not serving on the panel, permitted to be present at the discussions in order to keep themselves fully informed. It was, however, expressly stated that the arrangement was not to be treated as a precedent, and its defects from the point of view of Dominion status and influence are sufficiently obvious to preclude it being regarded as an effective settlement.

The Irish Minister at Washington.—The Irish Free State, following the example of Canada, declared its disinterestedness in the Lausanne Treaty on the score that it was a *res inter alios acta*, and very considerable efforts on the part of the British Government were necessary to secure the assent of that Government, with the

[1] See Keith, *The Times*, April 26, 1924, cited with approval by Mr. Mackenzie King in the Canadian House of Commons Debate, June 9, 1924 (pp. 3051 ff). It is noteworthy that recognition was accorded to Russia *de jure* by the British Government without obtaining Dominion assent, or even permitting the possibility of dissent, a procedure open to distinct objection.

[2] *Cf.* Mr. J. H. Thomas in the House of Commons, July 18, 1924, and Mr. Ramsay MacDonald's announcement at the opening of the Conference on July 23.

approval of the Dail, to the ratification of the Treaty. It must, however, be observed that, despite the difference in procedure, the Irish attitude towards the compact appears to be that of Canada; though the Treaty affects the Free State, that territory is under no obligation to take active steps to vindicate it if violated, the responsibility remaining that of the United Kingdom. The Free State also has emphasized its insistence on its distinction from the United Kingdom by taking no part in the London Conference on Reparations—a fact which may not be unconnected with the consideration that any action by the United Kingdom tending to diminish the British share of reparation payments may be set up as a counterclaim if and when an effort is made to assess the liability of the Free State in respect of a contribution towards the public debt of the United Kingdom. Even more important is the decision to secure the establishment of a Minister at Washington. The concession of the right to Canada in 1920 was naturally held to compel the acceptance of the Irish demand,[1] and the United States Government concurred in the proposal on June 28 last. The functions of the Minister are to deal with all matters affecting the Free State exclusively, and he acts under credentials granted by the King, on the advice of the British Government. The obvious difficulty of the position is how to maintain the unity of the Empire under the new conditions, and it is plain that the question has still to be solved. It is naturally hoped that the Irish Minister will cooperate with the Ambassador and discuss with him any issue which may seem to affect the Empire generally or any part other than Ireland, and in the event of disagreement the British and Free State Governments are to be appealed to. But this, of course, affords no security of any sort that the Free State may not conclude with the United States agreements which, in fact, may prejudice the Empire, or some part thereof, and obscurity exists as to the position of the Crown in such a case. Unless a constitutional innovation of the most important kind is to be tacitly made, no treaty can be signed by the Irish Minister without the approval of the Crown and authority to sign, and similar approval and authority are requisite for ratification. Moreover, the Crown can be advised only immediately by the British Government, so that control rests ultimately with that Government. If, therefore, the Free State is to attain her desire of independent treaty-making, either the British Government must agree to act automatically on requests

[1] *Cf.* Mr. J. H. Thomas's statement in the House of Commons, June 26, 1924.

by the Irish Government for authority to sign and ratify, or the Irish Minister must enter into agreements not couched in treaty form and, therefore, not concluded under full powers or ratified by the King. The disadvantages of either course are obvious,[1] but, on the other hand, it is clear that the Dominions cannot indefinitely acquiesce in a system under which the British Government possesses the power to refuse the right to conclude or ratify treaties on its own authority, and that there is a just claim for some change of system which will at least refer the decision of any difference of opinion to a wider authority, such as the Imperial Conference.

Problems for an Imperial Conference.—It is, therefore, clear that the treaty question alone offers adequate ground for a full discussion of Imperial relations, apart altogether from the difficulties arising from the decision of the British Government to refuse effect to the resolutions passed at the Imperial Conference of 1923 in favour of Imperial Preference and the fortification of Singapore. But, while the British Government was doubtless well advised in suggesting such a Conference, the difficulties in the way of progress are enormous. The suggestion favoured by Mr. Thomas as Secretary of State for the Colonies that the value of the Conferences might be improved by securing the presence of representatives of oppositions as well as of the Governments of the Empire is far from convincing ; it is much more probable, as Mr. Mackenzie King has pointed out, that the Conferences would be made still less effective than they are at present. The logical solution on this line of thought is a Federal Parliament which Dominion sentiment rules out of possibility. What appeals to Dominions such as Canada[2] or the Irish Free State is the establishment of their international status as one of equality with the United Kingdom, and Canada at least is anxious that this should be accomplished without the severance of the Dominion from the rest of the Empire. Recognition of this equality is preluded by the arrangements within the League of Nations, but it is natural that the Dominions should not be satisfied with makeshift arrangements such as that of the London Conference, or still more that of the Lausanne negotiations. These rest essentially on the old idea of the British Government as in the ultimate issue supreme in respect of the foreign relations of the whole of the

[1] *Cf.* Keith, *The Constitution, Administration and Laws of the Empire* (1924), pp. 66 ff, 93.

[2] *Cf.* Mr. Mackenzie King's speeches at Markham, Ontario, August 16, and at Winnipeg, October 4, 1924.

Empire ; a new orientation of outlook demands further concession by the British Government which it is probably too early for any Conference to determine.

Parliamentary Control of Treaties.—One essential feature of the position is the issue as to the degree of control over treaty-making to be exercised by Parliaments within the Empire. In the case of Canada the matter is complicated by the fact that Canadian opinion is accustomed to the limitation of the authority of the executive in this regard, through the necessity in the United States of obtaining the assent of a two-thirds majority in the Senate, and, therefore, feels that the Dominion Parliament should be consulted before international obligations of any kind are entered into. The somewhat exaggerated respect for executive action in this regard exhibited in the United Kingdom does not appeal to Dominion opinion, and even in the United Kingdom the propriety of a more effective parliamentary control over treaties has been conceded by the present administration, especially in the admission by Mr. Ramsay MacDonald that it would be open to Parliament to amend, if desired, the agreement with Russia.[1] More accurately put, this admits in substance to Parliament the right exercised by the Senate of ratifying subject to amendment, which has often successfully been done, the other party to the agreement concurring in the changes demanded rather than lose the treaty in question.[2] It is interesting to note that the Attorney-General of New Zealand is credited with protesting against this proposal as a dangerous innovation based on American practice, but it seems difficult to support this view. The exemption of treaties from parliamentary control has, in the past, largely been a mere survival of the period prior to responsible government, and the modern doctrine that Parliament should be the final authority appears essentially in accordance with the tendency towards a more complete democracy. In the case of the Empire, however, there is certainly the complication that the same rights as are possessed by the British Parliament cannot be denied to those of the Dominions, but the existence of this complexity is inseparable from that of the Dominions.

The Royal Prerogative in Dominion Affairs.—The report of the Judicial Committee of the Privy Council issued on August 1

[1] *Cf.* the debate in the House of Commons on August 7, 1924.

[2] See a list in C. C. Tansill's article in *The American Journal of International Law*, xviii, 477 ff.

on the boundary question submitted to it under Article 12 of the Treaty with the Irish Free State of 1921 is of constitutional importance in the emphasis with which it asserts the validity of the doctrine enunciated in *Attorney-General* v. *De Keyser's Royal Hotel, Ltd.*,[1] by the House of Lords that, when any matter embracing something which might fall within the prerogative is dealt with by an Act of Parliament, having necessarily His Majesty's assent, all within the ambit of the matter so dealt with can only be dealt with in future as the Act directs, and cannot be effected by an exercise of the prerogative outside its provisions. This definitely dismisses for Courts subordinate to the Judicial Committee any possibility of contending that the prerogative can only be abrogated by express enactment, and the principle enabled the Committee to decide forthwith that no other means of dealing with the Irish Boundary existed beyond that provided in the Irish Treaty as confirmed by Act of Parliament, it being impossible by the prerogative to appoint a Commissioner for Northern Ireland, since the Treaty contemplated appointment by the Government of Northern Ireland. Important also is the decision that the term "government" in the article of the Treaty in question denotes the executive government responsible to Parliament, and does not signify the Governor or Governor in Council, as in the case of a Dominion the term might be expected to indicate. The Judicial Committee, therefore, must not be regarded as expressing any opinion on the issue whether a Governor under responsible government can act without ministerial advice; if the appointment of a Commissioner had been given to the Governor or Governor in Council of Northern Ireland, the issue would have been directly raised, but under the circumstances it was successfully evaded. It is, however, clear that the view of the term "government" taken by the committee rests on the doctrine that the real government of any territory must be the responsible Ministry, and that the attitude of the Governor is merely that of the formal mode of expressing the decision of that Ministry, leaving no room for action on his part without advice.

Canadian Marriage Laws.—In a recent article[2] Mr. W. S. Scott has raised once more the vexed question of the extent of the legislative powers as to marriage of the Provincial Legislatures in Canada under the British North America Act, which, on the one hand, gives to the Federal Parliament exclusive authority as to marriage and

[1] [1920] A.C. 508.

[2] *Canadian Bar Review*, vol. ii, pp. 381 ff.

divorce, and, on the other, accords equally exclusive authority to the provinces with regard to the solemnization of marriage. The point is one of practical importance, for the legislation of Ontario requires the consent of parents or guardians to the marriage of minors under eighteen, and enacts that with certain exceptions "such consent shall be deemed an absolutely essential condition precedent to the formation or solemnization of a valid marriage, and the marriage, if solemnized without such consent shall . . . be absolutely null and void." Does the power to regulate solemnization extend to enacting such a requirement? Judicial authority is lacking, but there are dicta [1] which treat the power as dubious in the extreme. The only judgment [2] of the Judicial Committee which can be regarded as throwing any light on the matter is its declaration in 1912 against the power of the Federal Parliament to authorize any person, if empowered by provincial Act to celebrate marriages, to do so irrespective of the religious belief of the parties. The Privy Council made it clear then that it was within the power of the provinces, in regulating solemnization, to lay down conditions neglect of which would invalidate the marriage. But it did not define the extent of the meaning of solemnization beyond holding it to mean what it normally signified in the system of law in the Canadian provinces at the time of confederation. Unfortunately, there does not appear to be any relevant provincial legislation before 1867 to throw light on the issue. We are left, therefore, to other sources, and the chief argument [3] in favour of the provincial power is one derived from the language of Cotton, L.J., in *Sottomayor* v. *de Barros*,[4] in which he laid it down that "the consent of parents must be considered a part of the ceremony of marriage and not a matter affecting the personal capacity of the parties to contract marriage." It was, of course, in virtue of this distinction that the English Courts were able logically to allow the validity of Gretna Green marriages, contracted between persons who by the law of their domicile could not intermarry lawfully without parental consents, while recognizing the validity of domicile as the basis of capacity to contract marriage. This doctrine, however, can hardly be regarded as decisive of the view that solemnization of marriage includes consents, and there is one serious practical objection to the

[1] *Henderson* v. *Breen* (1923), 2 W.W.R 480, *per* Beck, J.; *Peppiatt* v. *Peppiatt*, 30 D. L. R. 1, *per* Meredith, C.J.

[2] *Re Marriage Legislation in Canada*, [1912] A.C. 880.

[3] Lefroy, *Canadian Law Times*, vol. xxxv, p. 506.

[4] (1877) 3 P.D. (C.A.) 1.

provincial legislation. It has, of course, no effect outside the Province; neither Ontario Courts nor other provincial Courts would refuse to treat as valid a marriage between persons domiciled in Ontario celebrated outside the Province without consents, so that the law can be evaded with ludicrous ease. If, however, the legislation is ultimately held, as seems probable, *ultra vires*, it must be admitted that it affords another illustration out of many of the difficulties arising from a federal constitution which assigns to a federal Legislature powers in matters on which, owing to social, religious and racial conditions, uniform legislation throughout Canada is neither desirable nor practicable.

Dominion Taxation of Provincial Officers.—Tardily the Judicial Committee has found occasion to express approval of the judgment of the Supreme Court of Canada when it decided [1] that it was perfectly legitimate for a provincial Legislature, in the exercise of its power of raising taxation for provincial purposes, to impose a tax on the income of a federal official. The argument against the power rested, of course, on the contention that such an exercise of the taxing power amounted to an effort to interfere with a federal instrumentality and to run counter to the express federal power under s. 91 (8) of the British North America Act to fix the salaries of the civil officers of Canada. The Court then admitted that the tax might be invalid if it were directed specially against federal officials, and were intended to hamper them in the carrying out of their official functions; but it held that, when the taxation was general and without discrimination against federal officers, its validity could not be questioned. The Judicial Committee has now [2] decided that the converse rule applies, and that the Dominion, by virtue of its general power of taxation for Dominion ends, may impose taxation on the official salary of a minister of the Crown in a province, provided always that the power of taxation is not used to destroy the capacity of action by the provincial officer. The decision was practically inevitable, but it was as well to have the authority of the Judicial Committee for the interpretation put on the constitution by the Supreme Court.

The French Language in Canada.—An instructive contrast between Canadian and United States federalism is drawn by Senator Belcourt in his interesting plea [3] regarding the status of the French

[1] *Abbott* v. *City of St. John*, 40 S.C.R. 597.
[2] *Caron* v. *The King*, 40 *The Times* L.R. 874.
[3] *Canadian Bar Review*, vol. ii, pp. 170 ff.

language in Canada. The Supreme Court of the United States[1] has decided that as a result of the fourteenth Amendment of the Constitution which provides that "no State shall deprive any person of life, liberty or property without due process of law," it is *ultra vires* a State Legislature to enact that no pupil in a school shall be taught a foreign language until he has attained a certain stage in his studies, since such an enactment violates the guarantee of liberty given by the Amendment. In Canada, on the other hand, the provincial Legislatures have assumed that they are wholly unfettered as regards the use of the French language, and in Ontario it has been thought necessary to impose definite restrictions on the use of French as a medium of education and on the teaching of French as a language. Senator Belcourt, however, contends that the provinces have not the power which they exercise, and bases his contention on two grounds. In the first place, the provincial power of legislation must be assumed to be limited by all fundamental and essential principles and human rights, of which the right to use the French language is clearly one; in the second place, Magna Carta, which has been adopted by Ontario, expressly forbids any man being "put out of his freehold, franchises, or liberties or free customs" save by due course of law, and the Quebec Act[2] assures His Majesty's Canadian subjects their civil rights. Neither argument, it is clear, can be accepted as valid in law; the Legislatures in Canada are free within their sphere to interpret the limits which they should put on the exercise of their powers, and the Law Courts have admitted their right to confiscate property without compensation if they think fit. Magna Carta has no reference to the liberty of the use of speech, and, even if it had, all that it or the Quebec Act requires is that restrictions on the use of language should be imposed by law.

The Legal Effect of Treaties.—Though it is now settled law that a treaty, not reinforced by legislation, is powerless to alter the municipal law of any part of the Empire, the point was raised again in *The Attorney-General of New Brunswick* v. *The Canadian Pacific Railway Company*[3] in a rather interesting manner. The point at issue was whether the Dominion Government had the right to authorize the construction and maintenance of a railway bridge by the company near the city of St. John, or whether the right was vested solely in the Province of New Brunswick. The claim of the

[1] *Meyer* v. *State of Nebraska*, 43 S.C. Reporter, 625, reversing 107 Neb. 657.
[2] 14 Geo. III, c. 83, s. 8.
[3] *Canadian Bar Review*, vol. ii, pp. 211 ff.

Province rested on the terms of Article 3 of the Ashburton Treaty of 1842 dealing with the free navigation of the river St. John, in which incidentally reference was made to regulations, not inconsistent with the Treaty, which might thereafter be made by the Government of New Brunswick for the navigation of the river. The reference, it was contended, sufficed to give the Province a right, which survived the Federation of Canada, to regulate navigation, for the Treaty, being one to avert war, must be regarded as *ipso facto* equivalent to a statute. It is hardly surprising that Grimmer, J., should have declined to give effect to this contention. It is obvious that, apart from the fact that the Crown could not by concluding a treaty alter the law of the land, the Treaty made no effort to do so. It merely provided for the right of New Brunswick on the one hand, and Maine on the other, to enact certain regulations as to navigation despite the terms of the Treaty, as a matter of international agreement, and it left it entirely for the municipal law of either country to decide by what authorities regulations should be made. The power, as a result of the British North America Act, is clearly vested in the Dominion alone.

Dominion and Provincial Powers as to Criminal Law.—The Judicial Committee has again reasserted the limitations on the power of the Dominion to use the right of enacting criminal law as a means of encroaching on the control by the provinces of civil rights. In *Attorney-General for Canada* v. *Attorney-General for Alberta*[1] it ruled that the effort of the Dominion by its Insurance Act of 1910 to control insurance generally was invalid, and in 1917[2] the Dominion Parliament endeavoured to meet this ruling by embodying in the Criminal Code provisions affecting the right of unlicensed persons or associations or companies, other than provincial companies, to carry on insurance business, other than marine insurance. Not unnaturally, the Judicial Committee in *Attorney-General for Ontario* v. *Reciprocal Insurers, etc.*,[3] has declined to give effect to this legislation, on the broad ground that the Parliament of Canada cannot, by purporting to create penal sanctions under s. 91 (27) of the British North America Act, appropriate to itself exclusively a field of jurisdiction in which, apart from such a procedure, it could exert no legal authority, and that if, when examined as a whole, legislation in form criminal is found, in aspects and for purposes exclusively within the provincial sphere, to deal with matters committed to the provinces, it cannot be

[1] [1916] 1 A.C. 588. [2] 7 & 8 Geo. V, c. 26. [3] 40 *The Times* L.R. 273.

upheld as valid. To hold otherwise, in their Lordships' opinion, would be to run counter to the principle of the confederation scheme, which, as Lord Watson said,[1] was " not to weld the provinces into one or to subordinate the provincial governments to a central authority," but rather, as Lord Haldane [2] has put it, to render the Dominion and Provincial Governments co-ordinate authorities within the spheres allotted to them by the Act. This principle was acted upon in various previous cases in which efforts were made by creating crimes to invade provincial powers, as in the case of the Liquor Licence Act of 1883 and the Combines and Fair Prices Act of 1919,[3] and the mere difference that the new provisions appeared definitely as parts of criminal law could not be deemed to take them out of the condemnation earlier pronounced. The Committee, as usual, left the question open what powers the Dominion possessed to extend the sphere of criminal law so as to touch on matters falling within the sphere of provincial authority, but it emitted a dictum of distinct interest in the suggestion that the Dominion might make criminal corruption in municipal elections or negligence in railway management, despite the fact that municipal elections and provincial railways fall under the exclusive power of the provinces. The Committee also left undecided how far the Dominion could, under its powers as to aliens and as to trade and commerce, impose special restrictions on aliens and on companies and natural persons, not aliens, immigrating into Canada. It held, however, that, as a result of the invalidity of the Canadian legislation as a whole, the Ontario Reciprocal Insurances Act, 1922,[4] was valid, and it rejected the suggestion that the legislation was illegitimate as purporting to have extra-territorial operation, on the ground that there was nothing in the language of the statute which necessarily gave it such operation. It was also held that it was no objection to the Act that its provisions might incidentally affect aliens and Dominion companies, though, if legislation under its own powers by the Dominion were enacted binding such persons, it might be that the provincial Act would be overridden *pro tanto*.

While this case indicates the restrictions on Dominion power, the Supreme Court of Ontario has held in *R.* v. *Lichtman* [5] that the Ontario Legislature cannot invade the province of criminal law.

[1] *Maritime Bank of Canada* v. *Receiver-General of New Brunswick*, [1892] A.C. 437.
[2] *Great West Saddlery Co.* v. *The King*, [1921] 2 A.C. 91, at p. 100.
[3] *In re Board of Commerce Act*, [1922] 1 A.C. 191.
[4] 12 & 13 Geo. V, c. 62.
[5] 25 O.W.N. 83.

The Betting Information Act, 1923 (c. 5), purported to prohibit, with certain exceptions, the publication of betting information, but it was ruled invalid on the ground that Dominion legislation had made it an offence to publish betting information with intent to aid or assist in betting, and that the provincial Act was in effect an attempt to amend that Act by making publication punishable without proof of intent.

Limitation of Right to Appeal.—The Judicial Committee, in connexion with their decision regarding the validity of the Dominion legislation as to insurance, had before them two appeals [1] by special leave from the judgments of the Appellate Division of Ontario on cases stated by a magistrate as to convictions under the Dominion legislation. Their decision on the validity of the Act relieved them from the necessity of dealing with the cases, and they contented themselves with recording the fact that the order of granting leave to appeal must not be considered as determining the question whether s. 1025 of the Dominion Criminal Code, which purports to take away the right of appeal in criminal cases in Canada, is *ultra vires* the Dominion Parliament, and whether, even assuming its validity, it would operate as a bar to an appeal from a conviction for an offence alleged to have been committed under a statute whose validity was impugned. As a matter of fact the terms of the Judicial Committee Act, 1844, obviously [2] are inconsistent with s. 1025 of the Criminal Code, and it can hardly be doubted what the decision of the Judicial Committee would have been, had the only mode of determining the validity of the Dominion legislation been the grant of leave to appeal from a conviction under it. In this case that necessity was obviated by the fact that the Committee was enabled to determine the validity of the legislation as an essential part of the immediate matter before them, the validity of the Ontario statute. Incidentally, the case illustrates the convenience of advisory judgments, for the question was brought before the Committee on appeal from Ontario from a judgment pronounced on a reference to the Court by the Lieutenant-Governor.[3]

Appeals from the Irish Free State.—The question of the appeal is of special interest because Canada is the model for the Irish Free State in all matters not specifically otherwise provided for in

[1] *Craigon* v. *The King*, *Otte* v. *The King*, 40 *The Times* L.R. at p. 279. Cf. *Attorney-General for Ontario* v. *Daly*, *ibid.*, at p. 815.

[2] *Cf.* Keith, *Imperial Unity and the Dominions*, pp. 369 f.

[3] Under R.S.O. 1914, c. 85.

the Treaty of December 6, 1921. If it were admitted that the Canadian Parliament had power to bar the appeal in criminal cases, it would certainly follow that it could do so in civil cases as far as the Supreme Court of the Dominion was concerned, at least as concerns matters within the exclusive jurisdiction of the Dominion. A similar claim could then be adduced for the Free State, and could not properly be disallowed. In point of fact, the Act of 1844 is so clear in its terms that this contention cannot be admitted as valid. Still less, of course, is it possible to accept the suggestion of Mr. Darrell Figgis,[1] that no appeal at all lies to the Judicial Committee. Mr. Figgis's reasoning is virtually that Article 66 of the Free State Constitution does not create a right, but merely protects a right which is assumed already to exist, and that no such right ever existed before the separation effected by the Treaty of 1921. The answer to this contention is, of course, simple ; the right is created by the grant of Dominion status similar to that of Canada, and, as the provisions of the treaty by both Imperial act and Irish enactment override the Constitution, when that document is inconsistent with them, the right to grant leave to appeal would have existed, even if the constitution had ignored it. In point of fact, the Constitution accepts and recognizes the right.

The Development of the Australian Constitution.—Sir Robert Garran, in a most interesting sketch [2] of the judicial interpretation of the Commonwealth Constitution, has called attention to a matter which may give legitimate satisfaction to the Judicial Committee. It will be remembered that there arose a grave conflict of opinion between the body and the High Court of Australia on the issue of the immunity of instrumentalities as a principle of interpretation of the Constitution. The High Court, in its earlier years, under the influence of the federal idea, declared that this principle, enunciated in a classical judgment of Marshall, C.J., for the United States in *McCulloch* v. *Maryland*,[3] must be held applicable to the Commonwealth, whose Constitution was framed in close relation to that of the United States, and it applied the principle to the case of state income-tax on federal salaries, which it held invalid. The Judicial Committee, on the same issue, held that the Constitution neither explicitly nor by necessary implication adopted the principle, and, therefore, laid it down that state income-tax Acts applied to federal salaries, a judgment which the High Court declined to follow. The

[1] *Fortnightly Review*, November 1923.
[2] L.Q.R. vol. xl, pp. 202 ff.
[3] 4 Wheat. 316.

High Court, however, unlike the House of Lords, feels itself able to vary its own decision and to abandon principles once asserted as established, and in 1920 in the *Engineers'* case [1] it asserted that a State in its industrial undertakings was subject to Commonwealth authority precisely in the same manner as any other trading concern, specifically negativing the doctrine of the immunity of state instrumentalities in the widest sense, and refusing to discriminate, as has been done in the United States, between the immunity of a State in respect of governmental functions and in respect of trading activities. The Privy Council doctrine of resort to the Constitution alone, without importing into it anything not necessarily implicit, has thus triumphed; the bias in favour of American precedent, which is somewhat conspicuous in the earlier judgments of the High Court, has gradually given way in favour of a more distinctively British jurisprudence.

Sir R. Garran calls attention also to the somewhat excessive rigidity of the Commonwealth Constitution, a feature which in fact it shares with the Canadian Constitution, although technically the two differ in essence, since the Dominion Constitution cannot be altered in any matter of substance without the intervention of the Imperial Parliament, which demands the assent of the provinces, while the Commonwealth Constitution may be changed by the people by referendum. The fact of failure of the efforts repeatedly made to alter the Constitution is curious and not altogether easy of explanation, for it cannot seriously be suggested that there is not grave need for change as regards the relative powers of the Commonwealth and the States. The question of subdivision of the large States is obviously one which must sooner or later be faced, and Sir R. Garran admits candidly that the Senate has failed to play the useful part in the Constitution for which it was destined.

The Legal Antiquities of Bermuda.—Bermuda, which has now a dubious reputation in connexion with prohibition in the United States, presents, as Major T. M. Dill, the Attorney-General, points out,[2] an interesting example of the development of the common law. The colony owes its Constitution, one of pure representative government, to the prerogative; only in 1888 were the Legislative Council and the Executive Council differentiated, and only in 1905 was there a fusion of law and equity. The Governor in Council lost shortly after the jurisdiction in error which he formerly

[1] See this *Journal*, Third Series, vol. iv, pt. i, pp. 107, 108; vol. v, pt. iv, p. 278.
[2] L.Q.R. vol. xl, pp. 227 ff.

enjoyed, while up to 1876 he acted as a Court of Chancery. The Legislature, through the power of the purse, controls effectively the policy of the colony in all local matters, and, though occasional disagreement has been known between the Imperial Government and the Legislature, serious divergence of view is extremely rare.

The Status of Kelantan.—The House of Lords, by its final decision in the Duff Development Company's appeal,[1] has definitely assigned to the Secretary of State the duty of determining what States are to be regarded as independent States at international law, so as to render applicable to their sovereigns immunity from the jurisdiction of the British Courts. However limited may be the practical exercise of authority by a sovereign, however closely His Majesty's Government may direct the internal as well as the external policy of a Malay State, if the Crown recognizes the ruler as an independent sovereign, the Courts will apply to him the doctrine of immunity. The case also decides in the widest sense the extent of that immunity; neither an agreement[2] to submit to arbitration under a clause embodying the Arbitration Act, 1889, nor even an application to a Court to set aside an award duly made under that clause, is such a submission to the jurisdiction of the British Courts as to enable a Court to make a valid order for the enforcement of the award. Lord Carson's dissent on this point is natural enough, but the decision is clearly in harmony with the authorities, especially *Mighell* v. *Sultan of Johore*,[3] which concerned a sovereign enjoying a position analogous to that of the ruler of Kelantan. But their Lordships have left it still open whether a sovereign who submits to the jurisdiction to the extent that judgment is pronounced against him can be deemed thereby to submit to execution of the judgment on property of his in the territorial jurisdiction of the Court.

Indian Divorces.—The vexed problem[4] of the validity of Indian divorces granted under the Indian Divorce Act IV of 1869 on the ground of residence, not domicile, is raised once more by the carefully considered judgment of the High Court of Judicature at Lahore in *Lee* v. *Lee*.[5] The facts in the case were not in dispute; the

[1] *Duff Development Co., Ltd.* v. *Government of Kelantan*, 40 *The Times* L.R. 566.

[2] *Cf.* also *Compañía Mercantil Argentina* v. *United States Shipping Board*, 40 *The Times* L.R. 601.

[3] [1894] 1 Q.B. 149.

[4] See Dicey and Keith, *Conflict of Laws* (ed. 3), pp. 845 ff.

[5] A copy of this judgment (January 5, 1924) has been courteously placed at my disposal by Sir Shadi Lal, C.J

parties were married in England, and domiciled there at the time when the petition was presented; but the petitioner was resident in India, and the matrimonial offence complained of was committed within the local limits of the jurisdiction of the Court. The High Court held, after prolonged consideration, that it was competent to dissolve the marriage, despite the lack of domicile, and that to refuse to do so would be to ignore the plain intention of the Act of 1869, which is content to stipulate that the petitioner must be a Christian and reside in India at the time of presenting the petition. It recognized that the divorce thus accorded might not receive recognition by other Courts, as having been pronounced in a case where the parties were not domiciled; but it declined to hold this a sufficient ground for refusal to grant a divorce. The result, of course, is extremely anomalous and inconvenient, for there is no doubt that the divorce is not one which English Courts would recognize. In its judgment the Court was at pains to establish the authority of the Indian Legislature to authorize divorce on grounds of residence alone by the Indian Courts, and there is no doubt that the view to the contrary of Sir H. Duke in *Keyes* v. *Keyes*[1] cannot be sustained. The question, however, remains whether the Lahore Court was bound to interpret the Act of 1869 in the literal sense adopted, or whether it ought not to have interpreted the law in the light thrown by the judgment of the Judicial Committee in *Le Mesurier* v. *Le Mesurier*,[2] which established for all Courts subject to its review powers the doctrine that divorce Acts should be interpreted, whenever possible, on the theory that they authorize only divorce in cases of persons domiciled within the area of the jurisdiction of the Court. The matter would be different if the Act formerly gave a petitioner a right to petition on the ground of residence; but it does nothing of the sort; it merely makes an indispensable condition of a petition residence in India at the time of presenting it, and it causes no legal difficulty or anomaly to hold that the Act ought now to be interpreted as authorizing only the divorce of persons domiciled in cases where the petitioner is also resident. Doubtless this was not necessarily the intention of the framers of the Act, for, when it was passed, views as to domicile in its relation to divorce were in a state of flux; but the point which now arises is whether it would not be well to place this interpretation on the Act in view of the judgment in *Le Mesurier* v. *Le Mesurier*, and in view of the now recognized fact that such

[1] [1921] P. 204. [2] [1895] A.C. 517.

divorces of persons domiciled in England are invalid there. This view has been held in other Indian Courts,[1] and, unless it is enforced on all Courts by the authority of the Judicial Committee on appeal, there seems to be opened up a prospect of chaos even in India itself, since one Court may treat as married persons whom another Indian Court regards as divorced. The only alternative, the passing of an Imperial Act to give all such divorces validity in England, appears to be open to grave objection, nor is it clear that justice requires that Indian Courts should have power to dissolve English marriages in the cases of persons whose domicile is English. Moreover, if a technical argument is required to strengthen the general position, it may be found in s. 7 of the Act of 1869, which requires the Indian Courts to follow as nearly as may be the principles and rules observed in the Court for Divorce and Matrimonial Causes in England. The requirement, being general, is subject, of course, to any express provision to the contrary in the Act; but that statute nowhere necessarily negatives the doctrine of basing divorce on domicile.

[1] See the judgment of a majority of the Bombay High Court in *Wilkinson* v. *Wilkinson*, I.L.R. 47 Bombay 843.

RECENT DECISIONS OF THE UNITED STATES SUPREME COURT AFFECTING THE RIGHTS OF ALIENS.

[*Contributed by* PROFESSOR JAMES W. GARNER, *University of Illinois.*]

Ineligibility of Japanese to Naturalization.—In the case of *Ozawa* v. *The United States*, decided November 13, 1922, the Supreme Court held that persons belonging to the Japanese race are not eligible to naturalization as citizens of the United States. The first Naturalization Act, passed in 1790, provided that any alien, being a *free white person*, might be admitted to become a citizen. By an Act of 1870 this category of eligibles was enlarged to include aliens of "African nativity and persons of African descent." The appellants in this case contended that it was never the intention of Congress to exclude the yellow, brown or other races of Asia; but the Court held otherwise, and affirmed that only aliens belonging to the "white" and African citizenship. The words employed, however, implied, said the Court, a "racial" and not a "colour" test, since the latter would "result in a confused overlapping of races and a gradual merging of one into the other without any practical line of separation."

The inferior federal and State Courts, which are the naturalizing authorities in the United States, had generally held that the words "white persons" were meant to indicate only persons which were popularly understood as belonging to the Caucasian race, and this interpretation the Supreme Court approved. Japanese, not belonging to this race, were not, therefore, eligible to naturalization.

It should be said, however, that some inferior Federal Courts and some State Courts had naturalized Japanese aliens. Some had also admitted Hindus, Syrians, Armenians, and half-breeds of various races, though others had refused to recognize them as belonging to the category of "white" persons. In fact, there had been no uniformity of decisions among the lower Courts, and since no appeal had ever been taken to the Supreme Court, there has been no final

determination of the meaning of the words in question. In the interest of uniformity of practice it is well that the matter has now been finally and definitely settled by the Court of last resort.

It is not the place here to consider the merits of the legislation the meaning of which the Supreme Court has now determined. One can hardly refrain, however, from observing that it seems quite illogical to admit Africans, to say nothing of the inferior races of Southern Europe, to the privileges of American citizenship and at the same time close the doors to the most worthy Chinese and Japanese. In the present case it seemed especially so. Ozawa had resided in the United States for twenty years, he had studied for three years at the University of California, and the Supreme Court admitted that he was well qualified for American citizenship by character and education. But, unfortunately for him, he did not belong to the Caucasian or African elect. Under the fourteenth amendment to the federal Constitution as interpreted by the Supreme Court (case of *Wong Kim Ark*, 169 U.S. 649) Asiatics born in the United States are citizens, and Congress has no power to deny them the rights of citizenship. This is the only means, therefore, by which an Asiatic may acquire citizenship in the United States.

Ineligibility of Hindus to Naturalization.—Following the decision in the Japanese case the Supreme Court unanimously held in the case of *Bhagat Singh Thind* (February 19, 1923) that a high-caste Hindu of full blood, born in India, was not eligible to naturalization. In fact, he had already been naturalized by a federal Court in the State of Oregon, and, a bill having been brought for the annulment of his Naturalization certificate on the ground that he was not a "white person," the question was certified to the Supreme Court for a final decision.

The Court went into an examination of the theories of text-writers on ethnology in regard to what persons belong to the Aryan and Caucasian races, declared that their opinions were irreconcilable, and concluded that the words "free white persons" employed in the Naturalization Act were to be interpreted in accordance with the understanding of the common man, that is, as synonymous with the word "Caucasian" only as that word is popularly understood, interpreted and used. Whatever might be the speculations of ethnologists, it did not include Hindus. The Court added that the physical characteristics of the latter race distinguish them from what are commonly recognized as white persons in the United

States. Their children do not quickly merge into the mass of American people and lose the hall-marks of their origin, as do the children of Europeans. And it concluded: "It is very far from our thought to suggest the slightest question of racial superiority or inferiority. What we suggest is merely racial difference, and it is of such a character and extent that the great body of our people notoriously recognize it and reject the thought of assimilation." As stated above, a number of Hindus have already been naturalized by the lower Courts, both federal and state, the vision of whose judges was apparently less beclouded in matter of colour than that of the Supreme Court; but it is understood that steps will now be taken to have their naturalization certificates revoked.

Incapacity of Japanese to own and lease Land in the United States.—In 1920 the Legislature of California passed a law prohibiting all aliens who were not eligible to American citizenship under the laws of the United States from owning or possessing any interest in lands in that State except as such right was allowed by treaty between the United States and the country whose nationality such aliens possessed. Likewise, a recent amendment to the Constitution of the State of Washington prohibits the ownership of land in that State by aliens other than those who have declared their intention to become citizens of the United States. By an act of the Legislature such aliens were prohibited from taking, leasing or holding the legal or equitable title or right to any benefit of any land. Since Japanese are not eligible to American citizenship, the effect of the legislation of both States was to exclude them from holding any interest whatever in land. The attempt to enforce this legislation was attacked both by Japanese, who desired to purchase or lease lands from American owners, and by the landowners themselves who desired to sell or lease their land to Japanese purchasers or renters. Their contention was that the legislation was not only in violation of a treaty between the United States and Japan, but contrary to the fourteenth amendment to the federal Constitution.

By the treaty, Japanese subjects have the right to reside in the United States, carry on trade, to own or lease and occupy houses and to lease land for residential and commercial purposes.

In several cases, of which *Webb and Coolidge* v. *O'Brien and Monye; Terrace and Nakatsuka* v. *Thompson; Frick and Satow* v. *Webb*; and *Porterfield and Mizuno* v. *Webb and Woolwine*, were the most important, the United States Supreme Court, in October 1923, held that the legislation referred to above was neither in violation

of the treaty with Japan nor contrary to the Constitution of the United States. A Japanese subject, therefore, cannot own land in either of these States, or cultivate it on a crop-sharing contract, or through the agency of a corporation, or even own stock in a corporation organized for agricultural purposes.

In interpreting the treaty, the Court called attention to the fact that by its express provisions the rights of Japanese were limited to the owning, leasing and occupation of houses and lands for "residential and commercial" purposes. This did not embrace the right to purchase, lease or even cultivate on crop-sharing contracts land for "agricultural" purposes. It also pointed out that, according to the words of the preamble, the treaty was one of "commerce and navigation," and that there was nothing in the language employed or in the history of the negotiations which indicated that it was the intention of the United States to concede the right of Japanese to own or lease lands for agricultural purposes. The American appellants who desired to sell or lease their lands to Japanese purchasers or renters contended that the legislation violated their rights under the fourteenth amendment, notably the right to dispose of their land freely to whomsoever they pleased; while the Japanese co-appellants contended that it equally violated their rights under the same amendment, which, among other things, forbids the denial to any "person" of due process of law or of equal protection of the laws—a protection which the United States Supreme Court has interpreted as belonging to aliens as well as citizens (*Yick Wo* v. *Hopkins*, 118 U.S. 356). But the Court held, in accordance with its earlier decisions, that the amendment did not deprive the States of their reserved power to regulate the use and disposition of land situated within their territorial jurisdiction, and therefore the legislation in question was not unconstitutional. It took occasion to add that the legislation in question involved no discrimination against the Japanese because of their race or colour, since it applied to all persons of whatever race or colour who were ineligible to American citizenship. In view of the language and history of the treaty and the interpretation which has always been placed upon the fourteenth amendment, the decision of the Supreme Court that the legislation was not contrary to either the treaty or the Constitution was a sound one; but the assertion of the Court that it involved no discrimination against the Japanese is hardly in accord with the facts. It is notorious that this legislation was aimed primarily, if not

wholly, against the Japanese, and the decision of the Court was locally hailed as the successful termination of a ten-year fight for a "white California." Press despatches, following the decision, announced that 30,000 Japanese farmers were preparing to abandon 500,000 acres of land which they were cultivating, and that the large landowners and fruit-growers who were dependent upon Japanese tenants were faced with the serious problem of finding new labourers.

Incidentally, it may be remarked that the decision of the Supreme Court sustaining this legislation reveals again an embarrassing weakness of the American federal system under which a local Legislature may enact laws affecting the rights of aliens, the effect of which may lead to serious international controversy. It will probably strengthen the opinion of those who, in increasing number, believe that legislation affecting aliens should belong only to the national law-making authority.

THE COLOUR BAR DECISION IN THE TRANSVAAL.

[*Contributed by* A SOUTH AFRICAN CORRESPONDENT.]

IN the case of *Attorney-General* v. *G. H. Smith*, heard in November 1923, the Transvaal Provincial Division of the Supreme Court of South Africa was called upon to give a decision as to the validity of the following regulation made by the Governor-General in Council:

179. The operation of or attendance on machinery shall be in charge of a competent shiftsman, and in the Transvaal and Orange Free State Provinces such shiftsman shall be a white man, but unskilled persons working under his directions may be employed on such operation or attendance, provided that the shiftsman exercises effective control.

This regulation purported to be made under powers conferred on the Governor-General by Section 4 of the Mines and Works Act, 1911, of the Union, and is one of a number of regulations promulgated under that Act which impose restrictions on the employment of coloured persons, and thus erect a barrier, popularly known as "the colour bar," which excludes coloured persons from certain portions of the field of industry. The term "coloured persons," in this connexion includes both the pure-blooded African native and persons of mixed descent, partly European and partly African.

The enabling section of the Statute empowers the Governor-General to make regulations for various special purposes in connexion with mines and machinery, including regulations as to "the conditions upon which machinery may be erected or used," and as to "the safety and health of persons employed in or about mines and works," and also for the general purpose of "ensuring the proper working and management of all mines, works and machinery." It does not expressly confer any power to make discrimination between different races or classes of persons, but it does provide that different regulations may be made in respect of different provinces.

Machinery is defined in the enabling Act as follows:

Machinery shall mean and include stationary and portable boilers, steam apparatus, steam and other engines, including locomotives, and all appliances or combinations of appliances which can be used for developing, receiving, transmitting, or converting either mechanical or natural power, but shall not include any locomotives owned or used by the Department of Railways and Harbours ;

and this definition applies to the term as used in the regulations.

The effect of the regulation is therefore, as the Court pointed out, not confined to machinery on a mine, but extends also to machinery employed elsewhere.

Among the numerous other restrictions on the employment of coloured persons which are imposed by regulations made under this same Act are the following :

In the Transvaal and Free State only a white person may conduct blasting operations in a mine. A banksman ganger and onsetter must in the Transvaal and Free State be a white person. A mine manager must be a white person in all the provinces. A coloured person may not in any province operate electrical machinery underground in any fiery mine except in intake ways or with written permission of the Inspector of Mines.

One of the contentions of the Attorney-General, who argued the case for the validity of the regulation, was that the regulation showed no intention to distinguish between the rights of classes, but that it merely placed a restriction on the owners of mines, and compelled them to place a white shiftsman in charge of machinery. But the Court (Tindall and Krause JJ.) held that the undoubted effect of the regulation was to " debar coloured persons in the Transvaal and Free State, no matter how competent, from a certain kind of employment, namely, being in charge of the operation of machinery," and therefore to discriminate against a large section of the population on the ground of colour. The Court referred to a series of Transvaal cases on municipal regulations in which the rule laid down by Lord Russell Chief Justice in *Kruse* v. *Johnson* (1898, 2 Q.B. 91) has been applied, and regulations discriminating between white and coloured have been held to be unreasonable and *ultra vires* in the absence of any provision in the enabling Statute giving authority to make such discrimination, and held that there was no ground for refusing to apply the same rule to the case before it in which the regulation attacked was made not by a local government authority but by the Governor-General.

The Court therefore decided that, as the Mines and Works Act

does not confer on the Governor-General, either in express terms or by necessary implication, any power to make a discrimination between white and coloured persons, the regulation was *ultra vires*.

The effect of this decision is far-reaching, because it seems obvious that, if the particular regulation in question is *ultra vires* on the ground stated, then all the other regulations made under the Mines and Works Act, which discriminate between white and coloured persons, are likewise *ultra vires* and invalid : in other words, the decision means that the industrial colour bar as established under these regulations vanishes altogether.

But, as has already been indicated, there is no novelty in the principle on which the decision is based : it is simply a fresh application of a principle already clearly recognized in Transvaal decisions.

An adverse decision on the question of the validity of these regulations had in fact long been anticipated, and the regulations have hitherto been allowed to remain nominally in force, without their validity being formally tested in the Courts, only because custom and public opinion in the Transvaal have supported restrictions on the employment of coloured persons wider in their scope, and therefore more severe, than those which the regulations purported to impose. The enforcement of the restrictions has thus rested on social rather than on legal sanctions ; these social sanctions still operate, and will for some time to come effectually prevent any revolutionary change in the organization and conduct of industry being made under cover of the decision now given.

For the origin of these regulations, restricting the employment of coloured persons in the Transvaal, which gave a semblance of legal sanction to the industrial "colour bar," we have to go back to Law No. 12 of 1898 of the South African Republic, section 104 of which provided as follows :

> Every person having charge of a winding engine used for raising and lowering persons in a shaft, or drawing the same along an engine-plane, shall be the holder of an engine-driver's certificate of competency, which he shall exhibit in his engine-room when on duty.
>
> No coloured person may hold an engine-driver's certificate of competency.

The insertion of such a provision in a Statute of the South African Republic was in harmony with the spirit of the old Grondwet, which contained an emphatic declaration against the recognition of equality between white and coloured persons either in Church

or State. But when the Transvaal became a British Colony a provision of this character was out of accord with the general principles of British colonial administration, and the Instructions issued in September 1902 to the Governor and Lieutenant-Governor of the Transvaal contained a clause requiring the reservation of any Ordinance which imposed special disabilities on persons not of European descent. Differential legislation as between white and black was of course unavoidable in a colony such as the Transvaal with a large uncivilized native population living in close contact with a community of European settlers; but the existence of such a clause cast upon the Colonial Office and the British Government of the day a special responsibility for any such legislation, and thus interposed an obstacle against the passage of such legislation which the local administration of the Transvaal was naturally unwilling to face unless compelled to do so.

This circumstance may perhaps account for the fact that the Mines Works and Machinery Regulations Ordinance, 1903, of the Transvaal, which repealed the republican law of 1898, contained no express provision with regard to differentiation between white and coloured persons employed in mines and works. But certain provisions involving such differentiation nevertheless found their way into the regulations made under that Ordinance.

The most important of these provisions related to the employment of Europeans as "banksmen," and "onsetters," officials who have responsible duties with regard to the raising and lowering of the cages or skips in which workmen are conveyed up and down the mine shafts.

Shortly after the grant of responsible government to the Transvaal in 1907 a Commission was appointed to examine the whole question of the mining regulations in force in the Transvaal mines. This Commission presented its final report in 1910. The new draft regulations recommended for adoption in their report included a number of regulations requiring that only white men should be employed in certain occupations. It was recommended, *e.g.* that only white men should be allowed to handle explosives. The general principle on which the Commission acted in recommending such restrictions is thus stated in one of the paragraphs of their report:

> The question of the employment of natives on skips, winches, and as signallers was carefully considered by the Commission, and it is of opinion that wherever the safety of life and limb is concerned only white persons should be employed.

The Mines and Works Act, 1911, under which the present regulations were made, was passed by the Parliament of the Union of South Africa in its first session.

As already stated, it contains no provision for racial discrimination. In view of the existence of the native and coloured vote in the Cape Province it would have been difficult if not impossible to secure the passage of a Bill providing for any discrimination against the employment of natives or coloured persons. The Court, in now holding the colour bar regulations to be *ultra vires*, has thus set aside an action taken by the Executive on its own responsibility, which, though strongly supported by public opinion in those parts of the Union directly concerned, would, if formally submitted to Parliament, have met with the bitterest opposition and might very probably never have gained parliamentary assent.

The whole question of the legal colour bar, so far as it concerned the mining industry, was reviewed by a Commission appointed by the Union Government in 1919 to examine the position of the low grade mines of the Witwatersrand.

The Report of this Commission, which was issued in 1920, contains a valuable summary of the position with regard to the colour bar as existing at that date. After referring to the terms of the Act, and to the regulations discriminating between persons simply on account of their colour, the Commission proceeds as follows :

This differentiation, not being authorized by the terms of the Act, is considered by many and, apparently, rightly so, to be *ultra vires*. It is, however, in operation.

164. In Annexure G we give a complete list of the provisions contained in the Mining Regulations which constitute the legal colour bar in the Transvaal and Orange Free State. These provisions are, however, only part of the colour bar operating against the employment of natives in certain classes of work. Custom and the constant efforts of the Trade Unions have secured a considerable extension of the white man's prerogative. In Annexure H we give a list of 51 occupations on the mines, including all officials. In 32 of these, comprising 7,057 persons, the employment of white men is prescribed by the regulations, but not in the 19 others, comprising 4,020 persons. Yet the colour bar is as rigorously applied in these as in the others.

165. Custom, public opinion and Trade Unions are therefore at least as powerful as doubtfully legal provisions in establishing and maintaining an effective colour bar. This is corroborated by the evidence given before us of the position at the De Beers mines, Kimberley.

Although no legal restrictions are in force here, the colour bar is as rigorously and effectively maintained as on the Witwatersrand mines, and any infringements upon it would be as strongly opposed by the white workmen. . . .

166. The removal of the restrictions from the regulations, while meeting, to a very considerable extent, some of the strong objections brought against them by numerous witnesses, would not, therefore, in itself, bring about any appreciable change in the effective colour bar. . . .

170. The question . . . involves consideration of the whole labour system on which the industries of the Union have been built up. In mining, as in most other industries, a more or less practicable *modus vivendi* has been arrived at, but the boundary line between the employment of black and white labour is highly artificial and liable to alteration from time to time. While the position of the supervising or highly skilled white is a perfectly definite one as against the unskilled native doing rough work, that of the unskilled white is not so obvious. He can hardly be considered to be the equal in efficiency of a native who by experience and practice has acquired proficiency in his particular class of work. The labour of such a native is therefore clearly of greater value to an employer than that of the unskilled white man, and, if there were no artificial restrictions, the latter would be driven to the wall. His standard of living is higher than that of the native, and where a skilled native would be content to take 5*s*. per day, because that would enable him to live in comfort according to his standard, the inferior white man will demand a higher rate of pay for the same work, less well done, because he cannot live in decency on less.

171. It is on this account that the white man looks upon the colour bar restrictions as a protection against what he considers to be unfair competition. We have on the one side a considerable body of more or less skilled and partly educated natives who clamour for opportunity to improve their pay and their station in life, and on the other a large number of whites who, through no fault of their own, have had no training in any particular trade. They claim protection against the competition of natives who are still in an inferior stage of civilization, and are strongly supported in this attitude by their more fortunate skilled fellow-workmen.

The majority of the Commission recommended the abolition of the legal colour bar. They stated that from the point of view of abstract justice, as between man and man, there was nothing to be said in its favour, and while they did not anticipate that its removal would in itself bring about any appreciable change in the relative positions of white and coloured workers, they thought that its removal would satisfy a number of educated natives to whom the legal colour bar was a great source of irritation, and would open the way to a gradual adjustment of the relations between white

and coloured persons in industry which would be for the ultimate benefit of both classes.

On this point the Commission said :

181. It has been pointed out that the employment of a proportion of natives on skilled and semi-skilled work would widen or maintain the scope for more skilled white workers, and, if by such employment the low grade mines can be kept working, this would certainly be the result. The number of natives who could pass the necessary tests and be promoted is not large, and, if proof of their fitness to advance is required, it is provided in the fact that despite regulations and public opinion they now, not infrequently, perform skilled and semi-skilled work.

182. If there were no legal colour bar, the boundary line of the employment of natives would be more elastic and could be altered, by mutual agreement between employers and workmen, to meet the circumstances of the case. Such variation is rendered very difficult when the colour bar is prescribed by statute or by regulation. In the case of a low grade mine, the continued existence of the mine may be only possible by extending the scope of the employment of natives to a wider extent than is necessary or customary elsewhere. A legal colour bar would prevent this being done until the law could be amended. This is too slow and cumbersome a procedure, and for it should be substituted the quick but satisfactory method of discussion and arrangement between employers and workmen.

A minority of the Commission, consisting of three Trade Union representatives, while not questioning that the legal colour bar was in fact *ultra vires*, dissented from the recommendation as to its formal abolition. They considered that such a step would cause serious unrest among the white workers, and would disturb public opinion unnecessarily to the detriment of industry.

The Government did not act on the recommendation of the majority report as to the removal of the legal colour bar, and the regulations therefore remained nominally in force until the Supreme Court was called upon to give its decision in November of last year. But in the interval had occurred the great strike of 1922 on the Witwatersrand gold-mines. In that strike maintenance of the colour bar was one of the battle-cries of the white workers. The Government stated at the time that it had no intention of interfering with the legal colour bar, but some of the proposed changes on the mines, the announcement of which led to the declaration of the strike, provided for the elimination of a certain number of white employees, and were commonly interpreted

as involving the substitution of natives or coloured persons for white men in certain occupations which had hitherto been reserved by agreement for the latter. After the collapse of the strike changes were carried out on the lines proposed, but subject to an undertaking given on behalf of the mining companies that for a period of two years a ratio of 10·5 native employees to one European employee would not be exceeded on the gold-mines of the Rand taken as a whole. The process of readjusting the boundary between the spheres of white and coloured workers in the mines, which the Low Grade Mines Commission recognized as desirable, was therefore already in progress before the question of the legal validity of the colour bar regulations was formally raised. The decision given by the Supreme Court may have some effect in facilitating this process of gradual adjustment.

CUSTOM IN THE PUNJAB.[1]

[*Contributed by* N. HANCOCK PRENTER ESQ., I.C.S.]

II.

THE agnatic theory has played such an important part in the judicial records of the last fifty years that it is worth while making further investigation as to how far it controls the ideas of the people with regard to the principle of succession. It is, of course, based on what Sir Henry Maine called the " Patriarchal System," the idea being that all the descendants of a proprietor form one united family and that each descendant, no matter how remote from that proprietor, has a right to succeed to the family property in virtue of his descent. The fact that this theory is allied to the commonest feature of Hindu Law, viz. the idea of a " joint family," brought judges like the late Sir Meredith Plowden to conclude that the agriculturist tribes of the Punjab (most of whom claimed Hindu origin) were fast bound by the agnatic theory of succession.

It was considered that the " natural law " of the patriarchal community found its legal expression in the joint family system, and that as a result of these two elements the rule of succession was that collaterals, no matter how remotely descended from a common ancestor, excluded all females and all strangers. In recent years, however, judges have found themselves faced with actual facts which have greatly weakened their faith in the prevalence of any such hard-and-fast rule. The fact is that circumstances prevented the growth of the " natural law " of an ideal patriarchal society, and it is at least questionable whether Hindu Law had ever any great hold over the people of the Punjab. History seems to show that the Punjab tribes were not the result of the expansion (by birth) of one family. As a matter of fact it is difficult to say which, if any, of the dominant tribes were native to the soil. The Punjab as it exists at present is peopled by invaders. An invading host in the nature of things is not a conglomeration of single families.

[1] In the previous article, pp. 69 and 79 the word " Arians " should have been spelt " Arains."

It is composed of groups of warriors. Such groups, though they may owe allegiance to a single ruler, do not claim or acknowledge descent from him. Moreover, each group is constantly enlarged by the accession of strangers, the amalgamation of conquered foes with it, and the birth of children from chance alliances with the women of the soil. Hence the typical Punjab tribe was at all times familiar with the practice of admitting strangers. Secondly, in the days when these invaders were spreading steadily over the land, there was no opportunity for a family to imbibe the idea that it was firmly attached to one spot. The younger members had no hesitation in leaving the patriarchal home and acquiring land for themselves. They cut themselves off from their inheritance by their absence, and hence there was no opportunity for the growth of the idea that remote connexion with a common ancestor entitled the distant collaterals to a share in the ancestral property. A third solvent of the patriarchal system is to be found in the poverty of the soil. Land was of little value, because it required more cultivators than were available. It was lightly taken up and lightly abandoned. In times of drought the superfluous members of the family moved away and were lost in the desert, whilst in good years strangers who could assist in cultivation were gladly welcomed. These three factors make it tolerably certain that the typical agriculturist tribes in the Punjab never, at any time, considered themselves bound by a strict agnatic rule of succession. A word or two may be added regarding the influence of Hindu Law. The invaders of the Punjab, some from the north and some from the south, were not Brahmins. They were not even very religious men. They were soldiers. It is difficult to find any trace of Brahminism in the agricultural customs of the Punjab. In particular, there is absolutely no indication that the title of one person to succeed to another in the possession of property is based on the capacity of the former for benefiting the latter by the offering of funeral oblations. This fact differentiates the Punjab sharply from Bengal. We find, however, that an older school of Hindu Law than the Bengal school, viz. the Mitakshara, attaches little or no importance to the capacity for offering funeral oblations. According to the Mitakshara, a *sapinda* succeeds not on account of religious efficacy, but on account of propinquity. This is also the Punjab rule, and it is submitted that a parity of circumstances throughout the whole of Northern India in pre-Brahmin times led to similarity of rules everywhere, and that in Bengal the growth

of Brahmin influence caused the inhabitants of Bengal to adopt new rules based upon religious principles, whilst farther west, where the Brahmins failed to acquire power, their special religious rules failed to find adherents. In short, it is possible to conclude that the succession of agnates is the fundamental natural law of succession amongst primitive peoples situated in countries like Northern India, and that no religious idea whatsoever had anything to do with its prevalence. This rule of succession was evolved solely from the nature of man and from his environment. In order, therefore, to understand its intricacies we ought to confine our attention to the people themselves and to their circumstances, and not to plunge into the disquisitions of religious writers. It has been noted that in the eastern part of the Punjab the Brahminical power was felt to a certain extent, and when dealing with it we shall of course have to take notice of the fact; but in the central block of the Punjab, which is now our special study, we may safely leave out of account any idea that the law of succession was influenced by Hindu Law.

The agnatic theory, therefore, in this part of the Punjab is almost entirely the natural theory that was evolved by families living in a semi-patriarchal system, according to which it was considered the natural thing that land should be inherited by such of the late proprietor's descendants as were still living in the neighbourhood at the time of his death. By a perfectly natural process of thought, it was considered that they had the best title to his land; that strangers could not expect, in ordinary circumstances, to succeed, and that females (not through any religious disability) were not thought to be proper persons to hold land which they were too weak to protect from aggressors. An additional and perfectly natural reason for the exclusion of females was that they usually got married and went to live in their husbands' homes. It is possible that the rules are here being stated a little too crudely, but these conclusions are amply borne out by a study of the mass of instances of succession that have been collected by the codification staff.

The famous agnatic theory, then, resolves itself into this: a deceased proprietor is succeeded by his fairly near collaterals (we may roughly take the fifth degree as the limit) to the exclusion of females and cognates. Now it has already been stated that our collection of instances shows an enormous number of exceptions to this simple rule. It is submitted that these exceptions are in

no way due to fickleness on the part of the people, or to a light-hearted readiness to abandon a more or less settled rule. It seems certain that, transcending the custom of agnatic descent, there is amongst the tribes of the Punjab an even more powerful and all-pervading custom. It is the custom of maintenance. This statement is not mere theorizing. It is based on a close study of the thousands of instances that have now been collected. Here again it is not necessary to look to Hindu Law for the origin of this custom. If religion is simply a system of morals, then no doubt the custom of maintaining helpless dependents has its origin in religion. It is essentially a moral custom. It is not, however, a branch of morality that is peculiar to any one religion. If an eighteenth-century phrase may be used it is part of the religion of humanity. It is due entirely to natural feelings of affection. But whatever may have been its origin, it is universal in the Punjab. A man on the approach or in the contemplation of death was not satisfied to leave his property to his agnates and to abandon his widow, his infant daughter, his unmarried sister, his aged mother to the tender mercies of his nephew or third cousin. He desired to provide for the maintenance of these dependents, and what is more his desire was considered by the community to be a natural and a good one. He gave effect to his desire and the community upheld his act. If, therefore, occasion arose, he had no hesitation whatsoever in breaking the agnatic rule of succession by making provision for his dependents. The very large majority of instances in which the agnatic theory has been disregarded are cases in which provision was made for some dependent who otherwise would have been left to starve. The way in which this provision was made differed in different parts of the province. The most general features to be noted everywhere are (1) the succession of the widow to the whole estate, and (2) the succession of the mother (in cases where the deceased had left no sons). These two features are so marked and so widespread that it is useless seeking for any special reasons for their prevalence. They are inculcated by neither Hindu nor Mohammedan Law and neither Rajput origin nor Mohammedan invasion can be invoked to explain them. They are native to the soil. When we come to daughters and sisters, we find a little more variety. Amongst many tribes and in many localities we find that the daughter of a sonless proprietor inherits her father's land to the exclusion of distant and even of near collaterals, up to the time of her marriage. But in some places it was felt that this was an infringement of the

rights of collaterals, and merely maintenance was allowed. Again, even when the daughter was married prior to the father's death it was occasionally seen that owing to the poverty of her husband, she might be left to starve. In such cases various devices were resorted to. For instance, in the northern part of our block there was the device of *khánádámádi*, whereby the husband of the daughter was taken into the family and treated as a son. He helped in the cultivation and ultimately he and his wife succeeded to the property. We find, however, that this device is not widely resorted to in the rest of the block, and by far the more general device was that of adoption. The word "adoption" is perhaps unfortunate, because on the one hand it suggests the well-known religious practice of the Hindus in other parts of India, where a man's chief preoccupation was to procure by means of this rite a person who would devote care, time and money to securing the salvation of the adopter's soul; and, on the other hand, it calls to mind the custom against which Mohammedanism had set its face. So here again we have to remember that, in the Punjab, adoption has nothing to do with religion. It is a secular business—the mere appointment of an heir—and its object is twofold. Firstly, it secures for the adopter efficient help in the cultivation of the ancestral property at a time when the owner is becoming too feeble to rely upon his own exertions and has lost the hope of getting a male heir in the ordinary course of nature. This circumstance explains the very large number of instances in which a nephew or a cousin was selected from the body of collaterals as sole heir to the estate. The second object is to provide for the maintenance of the daughter and her family, and the person selected is the daughter's son. This is in obedience to the universal rule that a helpless dependent must be maintained. The same principle is involved in the adoption of a sister's son, viz. the maintenance of a sister who otherwise might be left to starve. Again, amongst Mohammedan tribes, such as the Arains, we find an enormous number of gifts to daughters. The usual rule is that a proprietor cannot interfere with the natural order of succession by alienating his property, and hence, strictly speaking, gifts to daughters ought not to be allowed. It must not be thought, either, that Mohammedans make gifts to their daughters because the Koran provides for succession by a daughter. If these tribes were intending to follow strict Mohammedan Law they would assign to widow and daughter the fractions allocated to them in the Koran. This

they never do. On the contrary, they observe the rules of succession common to the whole body of agricultural tribes, and the most that we can say in favour of the view that their practice is modified by Mohammedan Law is that the general trend of public opinion amongst those professing the religion of Islam is not averse to the sight of females holding property in their own right. In short, they found a more or less congenial method of providing for helpless daughters by making them gifts. Still another method of providing for a helpless female who had obtained a sort of right to maintenance was the adoption of a step-son, or the making of a gift to him, thus securing a livelihood for his mother. These are some of the devices employed in order to satisfy the general feeling that dependents must be maintained. Besides their variety one other general characteristic must be noticed. This is that care is nearly always taken to see that such devices did not result ultimately in the diminution of the ancestral estate. Maintenance of dependents is a sacred duty, but in the performance of that duty the ancestral estate must still be preserved. Hence we find the universal rule that ancestral property coming into the hands of an unmarried or widowed female reverts to the agnates on the death or marriage of that female. This is an easy case. But what about the property that has come into the hands of a male, viz., an adopted daughter's son, or a son-in-law? Precisely the same result is secured by the rule (now firmly established) that such property reverts to the original line of agnates as soon as the direct line of the donee, or appointee, is extinct. In other words, as soon as there are no longer any of these dependent persons, the duty of maintenance is held to be discharged, and the land reverts to the agnates. But, in addition to these rules governing the practice of maintenance, we are frequently met with another complication. For instance, in a tribe or a family we find many instances in which an unmarried daughter is allowed to succeed to a whole estate until marriage, and in the very same tribe or family we find numerous other instances in which such succession is not allowed. Are we not here face to face with two different customs? I think not. We have still the same two guiding principles: (1) that the land must devolve on the agnate, and (2) that the helpless female must be maintained. If the estate is a small one it is probably sufficient merely for the maintenance of the daughter, and she is consequently allowed to hold it entirely until her marriage; but, if the estate is a large one, the general feeling is that there is no necessity to

hand it over in its entirety to the daughter; it must go to the agnate, and out of the superabundance of the produce, the helpless daughter will be maintained. Thus both principles are preserved. The same principles are the explanation of another apparent variation in custom. One of the most widely spread customs in the province is that a widow on remarriage loses her life-interest in her first husband's estate. This is a rule without an exception, in cases where she marries a stranger. But the writers of textbooks and some judges are of opinion that in cases where she marries the brother of her deceased husband, she does not lose her life-interest. The instances now collected ought to set this matter at rest beyond doubt. The universal rule is that a widow, on remarrying, whether her second husband is also her brother-in-law or not, loses her life-interest. The figures are overwhelming. At the same time we do find some exceptions—but they are not real exceptions. They are mere exemplifications of the paramount idea that helpless females must be maintained. In those cases in which a widow on remarrying her late husband's brother was allowed to retain her first husband's property, there were daughters by the first husband and it was only in order to secure their proper maintenance that the widow did not lose her life-interest. In short, we may rest satisfied that all the apparent variations in custom regarding the devolution of ancestral property find their explanation in two guiding principles of agricultural custom, viz. that the property must devolve upon the near agnates, and that helpless females must be maintained.

This lengthy disquisition has not been entered into as a matter of mere academic interest, but in the hope that a clear statement of the circumstances may help towards a solution of this problem of codification. When Sir Michael O'Dwyer summoned the first conference of judges in 1915 it was found that those who had pondered the question in earlier years, notably the late Sir Frederick Robertson, had been of opinion that the proper way to approach the problem was by laying down a number of *rebuttable presumptions*. That is to say, that certain fundamental propositions should be formulated as to the law of the land (which would largely follow Sir William Rattigan's *Digest*) and that it should be left open to litigants to prove that in a particular case a different custom was in existence. At the conference three main questions were discussed: (1) whether codification should be attempted; (2) if so, whether a series of rebuttable presumptions should be laid down;

and (3) whether the principle of rebuttable presumptions should be altogether abandoned, and a definite, positive code be enacted.

There was almost complete unanimity on the second question, *i.e.* it was decided that whatever else might be done there would be no system of "rebuttable presumptions." On the first point there was a substantial majority in favour of trying some sort of codification; and on the third the main difference of opinion was as to the sort of code that should be enacted, and how far the people themselves should be consulted.

At this stage a few general remarks concerning codification may not be considered out of place.

First, whether we call it a code or not, there can be little doubt but that at some period, sooner or later in the life of a civilized community, a uniform system of law embodying the main customs previously existent comes into being and is obeyed by the community as a whole. In most countries this system of law is frankly called a code, and no one questions its binding nature. In all cases it must have happened that customs peculiar to a family, a locality, or a section of the community have been overridden, but in no case has this suppression of a particular custom brought the general code into disrepute. Moreover, it has frequently happened that the code has not even been constructed on the basis of the existing national custom. It is common knowledge, for instance, that during the generations following the full flowering out of the revolutionary impulse in France, the Code Napoléon was adopted as the general rule of law in countries bordering upon France. Again, in countries outside Europe which were eagerly seeking after some system of law which would steady the fluctuations of local custom, the Code Napoléon was borrowed almost in its entirety. It will be objected that in England and the countries dependent on England, there has been no general acceptance of any body of law resembling the Code Napoléon. This is not exactly true. In England, during the last one hundred years, there has been a constant stream of codification. For the English people, "a nation of shopkeepers," the most important set of customs has been the commercial, and it is in this very direction that we find the maximum of codification; the sale and the purchase of goods, the formation and working of joint stock companies, and the operations of bankers, are now all carried out in strict conformity with the provisions of most stringent codes. It appears then that in practically all civilized communities there comes a stage when a vague body of customs is crystallized

into a code. It is certain that sooner or later the Punjab will establish for itself a code of law. This is a fairly complete reply to those who insist that the creation of a code will result in the stereotyping of customs whether good or bad. The code is bound to come some day, and when it does come this objection, no matter how valid, will be swept away.

It may be anticipated that these objectors will say that even granting this to be so it is imperative to await the proper psychological moment in the history of a community before stereotyping the existing customs into a code. The reply to this objection is threefold. The existing state of things in the Punjab is all but intolerable. Here are some remarks of one of the ablest Settlement Officers that the province has seen in recent years. In the Hoshiarpur volume of Customary Law, Mr. Humphreys says: "A tendency is manifesting itself to go still further, and occasionally we find in judicial decisions a certain custom found to prevail among a particular subdivision of a tribe inhabiting a particular town or village. A logical development on these lines would lead one to the *reductio ad absurdum* of every man being a law unto himself. I think that this tendency to abandon the general for the particular custom is one which cannot be viewed without a certain amount of apprehension." Now, though a very close study of the Chief Court and High Court rulings will show that this "logical development" of "one man, one custom" is being strenuously avoided by the judges and that they have succeeded in evolving a number of fundamental principles which tend to maintain a uniformity of practice in all the main tribes of the province, still we are faced with the fact that subordinate judges are not familiar with these principles without devoting years of study to a most difficult subject, and, after all, what is the difference between a judge-made body of fundamental principles and a code pure and simple?

The second reply is afforded by an appeal to history. The modern European systems of law, the codes in short, are the result of an immense number of earlier codes which were tried, and, for one reason or another, found wanting. The conquering kings who emerged one after another in the various countries of Europe as soon as the universal sway of Rome began to slacken had a regular craze for codification. In Germany, France, England, Spain and Austria (or rather in those portions of Europe which are now called by these names) we find scores and hundreds of codes. At first these were the autocratic pronouncements of some conqueror with

a genius or passion for codification. Later on, and to a regularly increasing extent, the wishes of the peoples were consulted, but the flow of codes never ceased. Eventually satisfactory codes were attained. It is hardly, then, a valid objection to codification in the Punjab, that the first code may be a bad one. The soul of goodness in things evil will persist and in the event a good code will be devised. In short, a code is not the end of all things.

It may now be said that what has happened in Europe will not happen in Asia, and that though European countries may have an internal bent towards codification, there is no such thing visible in the Asiatic empires. It is unnecessary to cite the code of Hammurabi or the laws of the Medes and Persians. We may content ourselves with observing the actual conditions of India. Leaving the Punjab aside, we find that the vague customs of most of the Indian Peninsula are more or less severely codified in Hindu or Mohammedan Law. For many years there used to be a keen discussion as to whether the rule of law in the Punjab was Customary Law modified by Hindu, or Hindu Law modified by custom. The discussion was a futile one. The probability is that in the remote past there was a vaguely general system of custom amongst all the Aryan tribes of India, with no consciousness of unity, but at the same time remarkably uniform in character. Its uniformity was due to parity of circumstance and similarity in environment. In the rest of India this vague general law became unified owing to the influence of the Brahmins into Hindu Law proper as known in the Dayabhaga and Mitakshara schools, whereas in the Punjab there was no such unifying influence, and the primitive vague system of custom remained unaltered or, at least, developed along its own line of evolution—it evolved in its own environment. Thus, in the Punjab, there is no question of custom modifying Hindu Law, or of Hindu Law modifying custom. This statement may require modification in the eastern and western parts of the province, but it is undoubtedly the substantial truth with regard to the central block. The point is that, just as the vague Customary Law was in a way codified in Bengal and the United Provinces by the Brahmins, so there is no racial reason why Customary Law in the Punjab should not be codified in an appropriate way. The reason why it has not become codified long ago is not because codification is repugnant to the people, but because hitherto no power has attempted the task.

The third reply to objectors has already been hinted at in the

first. A code may be altered just as a code may be manufactured. We have yet to devise the machinery of manufacture, and there is no reason why we should not, at the same time, devise suitable means for the alteration. Here, again, it is necessary to anticipate an additional objection. It will be said that once the code has been imposed it will be all but impossible to alter it. The objection is an exceedingly sound one, and it is with diffidence that an answer is suggested. The answer once more appeals to general principles. A long and close study of the apparently endless items of Customary Law, and the myriads of customs that we have to consider, reveals what may be fairly termed a distinction between two sets of customs. One set is primary and fundamental, the second is superficial, opportunist and variable. The High Court itself has long recognized the distinction, so much so that in many judgments we find allusions to " the general agricultural custom " of the province, and in the judgments of the subordinate judges, who are enunciating the feelings of the people without much regard to the niceties of language, reference is constantly made to some undefined body of law known to them as " the Customary Law of the province." More than one learned judge has found it necessary to lay down that there is not in the Punjab a general Customary Law in the sense in which English judges allude to the " common law " of England. Yet, in a way, the subordinate judge is right ; for there is a common law of the Punjab—common, that is, to the agricultural tribes. It contains few, very few principles. One or two of them may be cited. The sons of a proprietor are undoubtedly his heirs, and, with extremely few exceptions, they inherit equally. Secondly, in the absence of such lineal descendants, a proprietor is succeeded by his widow. Thirdly, the widow on succeeding holds merely a life-interest. Fourthly, the principle of adoption, or rather of the appointment of an heir, prevails. The list is not capable of much extension. The writer ventures to think that these are the primary and fundamental principles underlying the whole of the Customary Law of the province, at any rate of the block with which we are now dealing, and that the people have never had, and perhaps never will have, any desire to alter them. These few principles might be embodied in a suitable code, with the confident hope that this " cast-iron jacket," if it be one, will prove to be the convenient clothing of the tribesmen, never irksome, and never intolerable. The remaining set of customs is temporary, and extremely liable to change. A few examples of these may in turn be cited. The

succession of daughters in the absence of sons, the adoption of strangers, the power to alienate an entire property, the rights of absentees, the principle of division between sons (i.e. *pagwand* and *chundawand*)—in fact, the list could be extended to a great length. It is here that all who have considered the matter apprehend great danger in codification. There are, however, one or two methods of meeting it. The first is that the latter part of the code should consist of rebuttable presumptions. At the Conference of 1915 it did not occur to the minds of the deliberators that it was possible to combine the advantages of both systems—a universally binding and practically unalterable code with regard to first principles and main primary customs, and a code of rebuttable presumptions with regard to the temporary, superficial and fluctuating customs in matters of detail. The chief objection to this course is the difficulty of pursuing it. While it is a very easy matter to lay down the law definitely as regards "agnatic succession," it is a matter of the greatest difficulty to codify the general customs relating to maintenance. For instance, we have seen that different customs are in vogue in one and the same tribe with regard to large and small estates. Now how can we define "large estate" and "small estate" in a code? This is merely one instance of the sort of question that is decided with the greatest ease and certainty by the persons concerned. It seems futile to empower the Courts to exercise the discretion which as a rule is so wisely exercised by the people themselves. Once a case has come into Court it is extremely difficult for a stranger, no matter how impartial, to get at all the facts. One party is more active, more influential, more powerful than the other, with the result that the case is presented in a false light. Again, the fighting spirit is aroused, and neither party will hear of compromise. It is hardly worth while considering another and more drastic way of settling the difficulty, viz. to clothe the proprietor with full powers of disposal of his property. This would be to run contrary to the entire spirit of agricultural custom, and there is not the least doubt but that the people are not yet ready for a reform of such a nature. In any case, it would not really solve the difficulty, because in very many instances a proprietor would not take the trouble to make a will. The problem before us is to provide in the code for the exercise of that wise discretion which is almost invariably to be found in a family conclave, provided the litigious spirit is not aroused. The writer would, therefore, venture to suggest a provision in the code for compulsory reference

to arbitration. The code then would consist firstly of some very clearly-defined principles of succession. On them the law would be quite definite, and it would be the duty of the judge to administer it. In a very short time these principles (which are and always have been the guiding principles of Customary Law) would be so familiar to the people that little or no litigation would arise in connexion with them. Secondly, there would be the doubtful cases, all arising, as we have seen, from the great Customary Law of maintenance. It would be feasible to make a list of such doubtful cases, and provide that, when litigation should arise concerning any of them, the parties should nominate arbitrators selected by themselves and the judge from the respectable members of the community whose award would be considered by the judge, and embodied in his final judgment. In this way the broad principles of Customary Law would be preserved, and at the same time equity would be secured in conformity with the discretion of the people themselves. Take, for instance, the knotty point of the adoption of a sister's son. The general rule undoubtedly is that in the presence of near collaterals, such an adoption is invalid. But cases arise in which the general sense of the community is that some provision must be made for a widowed sister, and the most convenient way in which the matter could be settled is to allow her brother to adopt her son—the estate being too small a one, or the family feeling being too bitter, for the proprietor to be certain that proper maintenance would otherwise be provided. The circumstances are well known in the village, and the inherent sense of equity in the community would (if contentious litigation could be avoided) see that substantial justice was done. Suppose, therefore, that no amicable settlement has been reached, and that the collaterals have brought the case into court, it would be compulsory on the Court (if the writer's suggestion be adopted) to refer the matter to arbitration. The result would be that, whatever conclusion was arrived at, it would at least be the considered opinion of those who were best qualified to make an equitable decision.

It was at this stage of the discussion that the Codification Committee had to suspend operations owing to the financial stringency existing in the province. It is hoped that the operations will shortly be resumed so that instances of custom may be collected in the eastern and western blocks as they have already been collected in the central. In the meanwhile the committee ordered that the "instance cards" (which had been transcribed into appropriate

registers) should be printed. This has been done and there are now two large volumes containing the whole of the information so laboriously collected during a year of strenuous work by the codification staff. Moreover, a tentative code has been prepared, but is not yet ready for publication as the Committee were investigating the possibility of framing a code for each tribe, not because they had decided that this was the best or even a possible course to adopt but because the suggestion had been made in the Committee by some of the members.

The writer is of opinion that it is a sheer impossibility to frame a code for each tribe. The law would be more uncertain than ever, and the hope of introducing a uniform system of law based on the fundamental principles admitted by the people themselves to underlie their almost countless varieties of custom would recede into the distance. The writer is disposed to believe that a short code embodying the few well-recognized principles that clearly hold the field amongst the people of the province with provision for referring " hard cases " to the decision of the family concerned so as to preserve the great principle of " maintenance of females and orphans " would prove so acceptable to the people of the central block, whose customs have now been thoroughly ascertained, that it would probably be accepted with few modifications by the people of the eastern and western blocks also.

NOTE

The material that is now on record enables the writer to state that certain propositions may be definitely laid down as representing the General Customary Law throughout the whole central block of the Punjab amongst all the agricultural tribes. They are as follows:

1. The rule of succession to ancestral property is that the property devolves upon the sons or son of the deceased proprietor with the proviso that the son or sons of a son who has predeceased his father receive the share that their father would have received had he survived.

2. In the absence of such male lineal descendants the widow succeeds to a life-estate. If there are more widows than one, they share equally.

3. In the absence of a widow the mother succeeds to a life-estate.

4. In the absence of a widow and a mother the unmarried daughter or daughters succeed.

5. When any female has thus succeeded she loses her life-interest on marriage.

6. When any female has thus succeeded to a deceased proprietor she is entitled to succeed collaterally in his family, *i.e.* she receives what-

ever share in the ancestral property would have fallen to the person to whose estate she has succeeded had he been alive.

7. The widow of a predeceased son succeeds to the share that her husband would have received had he survived his father.

8. If a son refuses to maintain his mother, the latter is entitled to a share in the estate equal to that of the son, or, if there are more sons than one, to a share equal to the share that each son gets.

9. When the deceased proprietor leaves sons by different wives, all the sons inherit equally.

10. When a female has succeeded to ancestral property unchastity of itself does not involve forfeiture of the life-estate. Unchastity, coupled with the abandonment of the ancestral home, however, does involve forfeiture.

11. The proprietor of ancestral property cannot alienate any portion of the property without the consent of the heir unless for valid necessity.

12. A female who has succeeded to a share in the ancestral property can claim partition of her share.

13. A sonless proprietor can appoint an heir to succeed him from amongst certain of his relatives as follows: (*a*) He can appoint one out of several collaterals. (*b*) In the absence of collaterals related within the fifth degree, he can appoint his daughter's son. (*c*) In similar circumstances he can appoint his sister's son. (*d*) In similar circumstances he can appoint his step-son. (*e*) With the consent of the collaterals he can appoint any person.

14. A widow can appoint an heir exactly as her husband could have done provided that her husband has authorized her to do so.

15. In every case in which property has descended to any person other than the collaterals, the property remains in the family of that person until the direct line (male and female) is extinct; when the direct line is extinct, the property reverts to the collaterals of the originalholder.

16. A proprietor may gift a small portion (not more than one-twentieth of the estate) to anyone he pleases.

17. In the presence of collaterals related within the fifth degree he cannot gift more than one-twentieth of the estate except to one amongst the collaterals.

It is a simple matter to embody these leading principles in a code, but, with regard to a good many of them, provision must be made for exceptional cases, such as the following:

(1) Succession by unmarried daughter and widow equally.
(2) Succession by mother and widow equally.
(3) Succession by widowed daughter and mother, or widow equally.
(4) Succession of childless widow in presence of sons by another widow.
(5) Succession according to the *chundawand* rule.
(6) Gifts to daughters for maintenance in presence of near collaterals.
(7) Adoption of daughter's or sister's son in presence of near collaterals.

THE JOINT AND EQUAL GUARDIANSHIP OF INFANTS IN VARIOUS LEGAL SYSTEMS.

[*Contributed by* Sir James W. Greig, C.B., K.C.]

Of the many subjects for legislative solution in the Imperial Parliament one that seems certain to come up is the Equal Guardianship of Infants.

It is a topic which has been, and is being, much discussed by Women's Societies and other bodies in England interested in the application of the principle of equality in law between the sexes. The Sex Disqualification (Removal) Act has dealt with the general question. A Bill for enacting equal guardianship between parents is a phase of the principle applicable to the domestic relations which is now demanded by women in England and Scotland.

The Joint Committee of Lords and Commons set up in 1922, and continued in 1923 to examine and report on the Bill in question (which was originally introduced in 1921 into Parliament, and is called "A Bill to amend the Law relating to the Guardianship, Maintenance and Custody of Infants"), has not yet reported, owing to the untimely decease of Parliament: but in the course of its investigations it obtained, through the good offices of the Foreign Office, a statement from a large number of foreign countries of what the law is, on this topic, in those countries.

A short account of the information obtained may be acceptable to those interested in the matter. The rule on this subject in English law—and this term is used to designate the law prevalent in England and Ireland, and to a large extent also in Scotland (though in some features the Scottish law differs from the former)—is as follows:

"The father has the control over the person, education and conduct of his children until they are twenty-one years of age. That is the law" (*Agar-Ellis* v. *Lascelles*, 24 Ch. Div. 317). The law has been modified and moulded into its present form by the following, amongst other statutes: 12 Car. II, c. 24, s. 8; the Poor Law Amendment Act 1834 (4 & 5 Will. IV, c. 76, ss. 56 and 57); the Births and Deaths Registration Act, 1874 (37 & 38 Vict., c. 88,

s. 1); the Guardianship of Infants Act, 1886 (49 & 50 Vict., c. 27); the Custody of Children Act, 1891 (54 Vict., c. 3); the Notification of Births Act, 1907 (7 Edw. VII, c. 40, s. 1); the Children Act, 1908 (8 Edw. VII, c. 67); the Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict., c. 39); the Married Woman's (Maintenance) Act, 1920 (10 & 11 Geo. V, c. 63).

But the position substantially remains as laid down in the case above mentioned. Unless the husband is disqualified by misconduct, desertion or cruelty he it is who, in the last resort, determines the child's domicil, religion, education and upbringing.

The reports from foreign countries were elicited in response to the query:

"Whether the principle of joint guardianship of father and mother over infant children is recognized in the country in question." The replies show substantially four different forms or systems of law on the topic:

1. The English system, which is followed in most of the self-governing dominions and Crown Colonies (with some exceptions).

2. The countries in which joint guardianship is recognized.

3. Countries where the Code Napoléon prevails (or where the law is on a similar basis), which may comprehensively be called the Latin Countries.

4. A group of miscellaneous countries, with systems more or less peculiar to themselves.

The first group, which adopts the principles of English law on the topic, comprises the States of the Commonwealth of Australia, the Bahamas, Ceylon, Jamaica, the Leeward Isles, Newfoundland, Trinidad, and South Africa.

The second group (*i.e.* in which joint guardianship exists) is curiously mixed. They are the bulk of the States in the United States of America (the matter being one dealt with by State, not Federal Law), some of the Canadian provinces, Russia, Switzerland, Sweden, and possibly Serbia.

The third group (*i.e.* countries where the Code Napoléon or a similar code prevails) comprises France, Belgium, Brazil, Chili, the Argentine, Italy and Spain, and a few others. The miscellaneous, or fourth group, comprises Bulgaria, Denmark, Finland, Germany, Greece, Holland, Hungary, Poland, Rumania, Turkey, and Uruguay.

Dealing with Group I, Victoria has no joint guardianship, nor has Queensland. South Australia follows the English Act, the Guardianship of Infants Act, 1886. New South Wales, the

Bahamas and Jamaica also follow the English system. New Zealand is practically on the same basis. It has, however, a complete code dealing with infants, their custody, guardianship, contracts, adoption and protection. This codification is sadly wanted in England. The law has to be sought in a variety of statutes, cases, and also in the common law.

In Newfoundland the law is mainly the same as in England. It is regulated by the principles of the common law, and such Imperial legislation as became the law of Newfoundland prior to 1832, namely, the statute of 52 Hen. III, c. 17 (1267), Statute of Marlborough (a curious survival of mediæval law) and 12 Car. II, c. 24.

In South Africa the present law is the Roman-Dutch law amended by practice and legislation. The father alone is entitled to his minor children's custody, has control over their education and can consent to their marriage. He is primarily bound to maintain them until they can do it themselves.

In Trinidad the law is substantially as in England, but the Court has power to order access for the mother in proper cases.

In Canada, Ontario, Prince Edward Island, Quebec and Nova Scotia have no equal guardianship, but Alberta, Manitoba, Saskatchewan (partly) and British Columbia have it.

In Ontario the law is contained in the Infants Act, 1914, cap. 153, corresponding largely with the English Act of 1886.

In Alberta a statute of 1920 gives equality to the father and mother in these terms :

> Unless otherwise ordered by a Court, the father and mother of an infant or infants shall be joint guardians of such infant or infants and shall be entitled to the custody and control of such infant or infants, and hereafter the father of such infant or infants shall possess no right or control over the person, education and conduct of such child that is not possessed by the mother.

In Manitoba cap. 2 of the Statutes of Manitoba 1922 (an Act respecting the welfare of children) enacts the joint right of both the parents with regard to their children.

In Saskatchewan the revised statute of 1920 is peculiar. S. 2 of this enactment gives the mother the custody of her infant child until the age of fourteen. On the death of the mother, or on the child attaining the age of fourteen, the custody of the child belongs to the father, if living.

In British Columbia, in May 1917, a statute was passed entitled,

"The Equal Guardianship of Infants Act." As this statute is a typical instance of this kind of legislation in dealing with the subject in an English Dominion, a few of its main clauses may here be given. They indicate the lines upon which any amending English statute would have to proceed.

AN ACT TO AMEND THE LAW RELATING TO THE GUARDIANSHIP AND CUSTODY OF INFANTS

1. This Act may be cited as the "Equal Guardianship of Infants Act."

2. In this Act:

"Infant" and "minor" shall mean a person who is unmarried and under the age of twenty-one years, and includes any child who is unborn at the death of its father.

. . . . . .

4. All disabilities of married women with respect to the guardianship of their minor children are hereby removed.

5. The husband and wife living together shall be joint guardians of their minor children with equal powers, rights, and duties in respect thereto, and there shall be no paramount right to either in connection therewith.

6. It shall be lawful for either the father or the mother, if under age by deed, and if of full age, by deed or will, to appoint any person to act in his or her place as guardian of an infant child after his or her death respectively, if the child is then an infant.

7. In case of the death of either of the parents, the surviving parent shall become sole guardian of their minor children, and shall have and may exercise all the powers theretofore exercised by the parents jointly; Provided that, whenever a guardian has been appointed under section 6 the survivor shall exercise all such powers jointly with such guardian.

8. If at the decease of either parent the survivor is solely or jointly with the other parent a guardian of his or her minor children, he or she shall not thereupon become such guardian except by order of the Court.

9. Should the surviving parent remarry, he or she shall continue to possess and exercise all such powers, rights, and duties as fully and to the same extent as if such remarriage had not taken place.

11. If the husband and wife are living apart voluntarily, the guardianship of the infant children may be arranged by agreement in writing between them. In the absence of such an arrangement, or in case either party desires its termination, he or she may apply to the Court for an adjudication as to the guardianship under the circumstances. Pending such adjudication, the husband or wife who actually has the custody and control of their infant children, or any of them, shall retain said right of custody and control, and be entitled to the guardianship of such children.

17. In the event of guardians being unable to agree upon a question affecting the welfare of an infant, any of them may apply to the Court

for its directions, and the Court may make such order as may be deemed proper.

21. Where an application is made by the mother of a minor it may be without next friend.

22. The support of their minor children shall be chargeable jointly upon the property of the husband and the property of the wife, and in relation thereto they may be sued either jointly or severally.

There are also clauses dealing with the case of judicial separation, and the appointment and removal of guardians. The Act also defines the authority, duties and resignation of guardians and other matters.

Examples may next be given of the law in a few other countries where equal guardianship prevails.

In Sweden a distinction is made in law between guardianship which relates only to the child's finances, and is normally exercised by the father only, and "the care or charge of the child" which is normally confided to both parents. The right of decision as to the child's person is vested in both parents jointly. A law of June 11, 1920, enacts that if the father dies the mother is guardian.

In Russia the law confers equal rights upon the mother and father; but the question of family relations in Russia is so indeterminate at present, that it is not a very useful precedent.

The Russian Code of 1918 enacts that the parents may exercise their paternal rights over a male child until he attains eighteen years of age, over a female until she is sixteen.

By paragraph 150 paternal rights are exercised by the parents conjointly. In case of disagreement between the parents the disputable question is decided by the local Courts with the participation of the parents. The duty of maintaining the children is put equally upon both parents. The amount of maintenance to be paid by them is defined in accordance with their means, but the sum must not be less than is determined by law for a child of a given locality.

The United States is full of instances of equal guardianship. It is dealt with by the State Legislatures, and not by the Federal Legislature. The States which do not appear to have it are Alabama, Delaware, Louisiana, South Carolina, Tennessee, Washington and Wyoming. There may be a few others as well. Altogether, thirty-one States appear to have adopted it.

In a case which occurred in Idaho (*The State* v. *Baslin*, 19 *Idaho Reports*, 1917) the judge said:

While we have no such provisions in our constitutions or statutes, still, on a fair construction of all our statutes in relation to parent and child and guardianship of minors, the mother has equal rights in the custody of the children with the father. They are in fact full partners in that regard. The father has no absolute right to deprive the mother of the care and custody of the infant simply because he is the father. At the time the mother left Cœur d'Alène City with the child for La Crosse, and from thence went to the State of Washington, under the law she had a right to the custody of the child equally with the husband, and, as she has equal right with the father to the actual care and custody of the child, it is clear that she could not have been punished under the provisions of the State Law, section 6800, for taking the child. The mother, under section 3192 of the code, is equally entitled to the care and custody of the child.

The law in countries in which the Code Napoléon prevails does not recognize joint guardianship. During the joint lives of husband and wife the authority belongs to the husband alone, and is called "la puissance paternelle," the "patria potestas" in fact of Roman law. The Code Napoléon is the extreme form of inequality, but in practice the result would appear not to work much hardship. According to the French proverb: "Les femmes peuvent tout parce qu'elles gouvernent les personnes qui gouvernent tout."

After the death of the husband or wife the survivor becomes *tuteur*, or guardian, subject, in certain circumstances, to the control of the Family Council and an assistant guardian. If a widow, for instance, wishes to remarry she must, before doing so, convoke a Family Council, and they decide whether she shall retain the guardianship.

This system prevails, with certain adjustments, in Belgium, Brazil, Spain, Holland, Italy, Chili, the Argentine, Finland, and Greece.

In Germany, Greece, and Hungary the law is much the same.

The miscellaneous systems, none of which recognizes joint or equal guardianship, comprise, amongst others, Turkey. There the question of guardianship is a matter for the Ecclesiastical Courts. The principle applied in that Court is that the mother is responsible for the custody of male children up to an age, which is determined by their need for maternal assistance, in regard to food, clothing, etc., which in practice is put at seven years. She is entitled to the custody of female children up to a later age, which is determined by physical development; in practice this is put, by different authorities, at nine to eleven years.

The father has the custody of minor children above the ages just indicated. This right is absolute, whereas the right of the mother in the case of younger children is invalidated in certain cases by remarriage.

The relative merits of these systems is not dealt with in this note, as it would lead to too lengthy a disquisition. In any event, the object aimed at above is simply to point out the extent to which the principle has penetrated the various extant legal systems. That it is bound to progress further as the demand for the emancipation of women, and equality of rights and duties (as far as may be) between the sexes gains ground, is evident, and it is likely to be the subject of much discussion and advocacy in the Imperial Parliament in England.

The proposed Bill alters the fundamental principle of English law that, except where disqualified by misconduct, desertion or cruelty, the father's will must prevail in the control of the offspring of the marriage. The Bill embodies another principle, that the mother has a right to have more control and responsibility and to be on an equality with the father. It is alleged that the Chancery Courts have ample jurisdiction to meet all cases that occur. The reply to this is that many cases amongst the less wealthy sections of the community cannot, and do not, go to the Chancery Court for lack of funds, and that it is just and right to enlarge the jurisdiction of the Summary Jurisdiction Courts.

It is unjust to the wife, and would be better for the child, if the scales of justice were not weighted against her, by the rule that, *prima facie,* the will of her husband must prevail. The knowledge on his part that, if equal guardianship be sanctioned, her wishes would be entitled to as much weight as his, would lead to the spouses adjusting any differences of opinion on the upbringing of their children, and would prevent overwhelming numbers of cases coming before the Court, as some fear.

It is contended that it is only justice to give the father and mother, in every class, equal rights and duties with respect to their legitimate infant children. It is also argued that both parents ought to share, according to their means, the responsibility of maintaining and educating their children. Lastly, it is said that the resources and sanctions of the law should in these cases be open and available to all sections of the community, and that the machinery of enforcing maintenance orders ought to be improved.

INTERNATIONAL STATUS OF MANDATORY OF LEAGUE OF NATIONS. HIGH TREASON AGAINST MANDATORY AUTHORITY.

[*Contributed by* E. L. Matthews, Esq., K.C., C.M.G.]

In November 1922 judgments of some importance and interest were given in the Appellate Division of the Supreme Court of South Africa on a matter which concerned the international status of the Government of the Union of South Africa as mandatory of the League of Nations under the Treaty of Versailles. That division of the Supreme Court of the Union is, by virtue of an Act of the Union Parliament passed in 1921, a Court of Appeal from the judgments and decisions of the High Court and the Circuit Courts, established in the mandated territory of South-West Africa. The matter in question arose in a case entitled *Rex* v. *Jacobus Christian*. In a Circuit Court of the mandated territory Christian was indicted for certain acts alleged to amount to high treason committed in May and June, 1922. An exception *in limine* was taken to the indictment by counsel for the accused. The nature of the exception will presently appear. It was overruled; but the judge presiding at the trial reserved, at the request of the accused's counsel, for the decision of the Appellate Division sitting at Bloemfontein in the following succinct form, a question of law: "Whether the charge, as laid, discloses the crime of high treason?" The charge had been laid as follows:

> That Jacobus Christian having been, during the whole period covered by the indictment, an inhabitant of the mandated territory of South-West Africa, and owing allegiance to *His Majesty King George V in his Government of the Union of South Africa, as the mandatory thereof under the Mandate conferred by the Treaty of Versailles upon His Britannic Majesty for and on behalf of the Union of South Africa*, is guilty of the crime of high treason in that he did, while a state of war and rebellion existed in the mandated territory against His Majesty and the Government of the Union of South Africa as by law established in the territory, and *owing allegiance as aforesaid to the Government of the Union*, wrongfully and unlawfully and with hostile intent disturb and endanger the existence or security of the said Government and assist the enemies of His Majesty; and thereby committed the acts of high treason

described in eleven events which followed this preamble.

The Court of Appeal was not concerned with the facts, but solely with the question of law reserved by the judge presiding at the Circuit Court. The argument of counsel for the defence was that the facts and circumstances alleged and described in this indictment did not constitute the offence of high treason because that crime—*Hoogverraad*,

or *perduellio*, of the Roman-Dutch law—can only be committed against a sovereign Power which acknowledges no superior, and the mandatory is not such a Power.

It will be convenient here to mention certain circumstances assumed, but not dealt with, in the judgment. The Roman-Dutch common law was declared to be in force in the territory shortly after the Treaty of Versailles was ratified. This was done under a proclamation issued by the Administrator of the Territory, such proclamation being issued under powers delegated to him by the Governor-General in Council of the Union of South Africa. The authority to legislate for the territory, by proclamation, was conferred on the Governor-General in Council of the Union, by Act No. 49 of 1919 of the Union Parliament, and that Act specifically authorized him to delegate those legislative powers to the Administrator of the territory.

The mandate which has been issued by the Council of the League of Nations in respect of South-West Africa is one of the "C" type described by Professor Berriedale Keith, D.C.L., in this *Journal*.[1] It was issued by virtue of Article 22 of the Treaty. After reciting that the principal Allied and Associated Powers have agreed that a mandate shall be conferred on His Britannic Majesty *to be exercised on his behalf* by the Government of the Union of South Africa to administer the territory and that His Majesty, on behalf of the said Government, has agreed to accept the mandate and to exercise it, on behalf of the League of Nations, in accordance with its provisions, the mandate proceeds to confer on the mandatory full powers of administration and legislation over the territory as an integral portion of the Union of South Africa and to authorize the mandatory to apply the laws of the Union subject to local modifications. The mandate is subject to certain conditions and certain duties are imposed upon the mandatory. Reference will presently be made to those, inasmuch as they were discussed in the judgments in regard to the test of that sovereign status of the governing authority which is necessary to a charge that high treason has been committed against it.

A few words of explanation are also here necessary as to the characteristics of the crime of high treason in Roman-Dutch law. The Appellate Division had recently in a case of high treason in the Union itself (*Rex* v. *Erasmus*, 1923, A.D. 73) laid down that, while the hall-mark of this crime is the existence of a hostile intention against the State or the sovereign, what is known to the law as *perduellio* is a branch of the *crimen majestatis* which covers any offence against or encroachment upon the dignity, authority or power of the State. The argument addressed to the Court of Appeal on behalf of Christian, the accused in the present case, was, therefore, that there could be no *crimen majestatis* where the authority concerned has no *majestas*. The answer of the Court to this, after discussion of the textbook writers (Voet: *Commentaries on the*

[1] *Journal of Comparative Legislation*, Third Series, vol. iv, pt. 1, p. 74.

Pandects, 48. 4.5 ; Matthaeus : *de Criminibus*, 48. 4.3 ; Moorman : *Misdaden*, 2 . 1 . 1. ; Grotius : *de Jure Belli*, 1. 3. 21. 2 ; and others) that *majestas* is exercised in two directions and has a dual aspect. Internally it relates to the power of making and enforcing laws. Externally it relates to freedom from outward control. Illustrative of these were :

(1) The seven Provinces of the Netherlands, after the Union of Utrecht in 1578, where, through the control of foreign relationship, conduct of war and the making of treaties were vested in the States-General, nevertheless, each Province undoubtedly retained its sovereignty, and treason could undoubtedly be committed against the *majestas* of any individual Province.

(2) The position of the Ionian Islands, when, after 1815, though they were declared to form a single free and independent State, but were placed under the immediate and exclusive protection of the King of Great Britain and Ireland, who had the right of conducting all foreign relations and of placing the Ionian military troops under the orders of the commander of the British troops. Nevertheless, the Ionian Code made it high treason for any Ionian subject to adhere to the enemies of the Ionian State or of the protecting Power (Wheaton's *International Law*, ch. ii, s. 35 ; Forsyth's *Cases in Constitutional Law*, p. 476).

(3) The position of the South African Republic, which, by the Convention of London, 1884, was placed under the suzerainty of Great Britain and its freedom in *external* affairs considerably curtailed. Yet its claim to *majestas* was unquestioned. After the Jameson Raid in 1895 several residents in the Republic who had been in correspondence with Dr. Jameson were convicted of high treason against the Republic. They were British subjects, and the suzerain Power was represented at the trial (*The State* v. *Phillips and others*, 1896, Transvaal Off. Rep. 216).

The Court then proceeded to examine the constitutional and legal position of the mandated territory and its Government under the Treaty. For this purpose it found it necessary to examine various articles of the Treaty and to indicate what seemed to it to have been the intentions of the signatories in regard to these articles. The views of the Right Honourable Sir James Rose-Innes, the Chief Justice, as to these articles will be briefly summarized here. For not only do they form the basis of his judgment, but incidentally they may be of interest to the readers of this *Journal* in relation to the contribution (to which reference has already been made) on "Mandates" by Professor Berriedale Keith. With regard to Article 119 of the Treaty under which Germany renounced in favour of the principal Allied and Associated Powers all right and title over her *oversea* possessions, the Chief Justice points out that the expression "renounce in favour of" is sometimes in the Treaty used as equivalent to "cede to," and he draws attention to Articles 83 and 87 under which Germany "renounced in favour of" Czecho-Slovakia and Poland all right and title over certain areas. That, he points out, was a cession in each case of the area, which became portion of a new

State. Not so, however, with the *overseas* possessions, or, at any rate, with such of them as fell within Article 22 of the Treaty. They were not, by Article 119, ceded to the Powers any more than the city of Danzig was ceded under Article 100. The *animus* essential to a legal cession was not present on either side, for the signatories to the Treaty must have intended that the *overseas* possessions of Germany should be dealt with as provided by Part I of the Treaty, that these possessions were placed at the disposal of the Powers merely that the latter might take all necessary steps for the administration on a mandatory basis, that the difference between territory actually ceded and territory renounced in order to be mandated is shown by a comparison of Articles 254 and 257. In the former case the cessionary is compelled to assume responsibility for a proportion of the German debt ; in the latter case no such obligation is imposed on the mandatory, in spite of the fact that all German public property in the territory is transferred to it. The Chief Justice infers, therefore, that the intention of the signatories was to place the German overseas possession upon a basis new to international law and regulated primarily by Article 22 of the Treaty, an article which must be read in the light of the articles preceding it. Under these preceding articles the League of Nations was constituted.

The Chief Justice then points out that these articles do not call a new State into being, but that the League is nothing more than an association of States which, while retaining their own sovereignty and status, have agreed with one another to pursue a certain line of conduct in international affairs and to co-operate in certain matters of general international concern. But the League is, of course, not a State ; it owns no territory, governs no subjects, and is not endowed with the attributes of sovereignty. The Chief Justice, having examined the provisions of Article 22, and referred to the three types of mandates issued in accordance with it (see Professor Berriedale Keith's contribution above referred to), and having examined also the terms of the South-West Africa Mandate (which, as has been stated, is one of Class " C "), is then in a position to decide whether the holder of this mandate, clothed with the powers conferred, and subject to the restrictions indicated in the mandate, is, in accordance with the principles of Roman-Dutch law, possessed of *majestas* so that an attack upon it with hostile intent involves the crime of high treason.

The question he then discusses is whether the obligations resulting from the acceptance of the mandate and the limitations interwoven with the constitution of the mandated territory are inconsistent with the existence of *majestas* as an attribute of the mandatory authority. The position is regarded by him first from the internal, and then from the external, point of view. Full power to administer and legislate for the mandated territory is vested in the mandatory, and the restrictions upon internal policy contained in the mandate are not, he concludes, inconsistent with sovereignty ; for they are restrictions or stipulations

which might appear in a treaty between sovereign States controlling undeveloped territories; they are no more than treaty obligations voluntarily undertaken, and they retain that character, though incorporated in the constitution of the territory. As to the effect of the conditions which govern the external relations of the mandatory, these conditions do no more than indicate the policy which the mandatory should pursue. For example, the obligation imposed upon the mandatory to lay before the Council of the League an annual report in reference to the mandated territory and the provision made for a permanent commission to advise the Council on all matters relating to the observance of the mandate, are taken by the Chief Justice merely to indicate an intention to confer some degree of supervisory authority on the Council. However that may be, the limitations on its powers to which the mandatory has consented by accepting the mandate are not, he considers, inconsistent with the possession by the mandatory of *majestas* within its own territory, and such *majestas* as formerly resided in the German Government in respect of the territory must now reside in the new authority—the mandatory; for there is no other State or Power in which it can be vested. The international status of the Union of South Africa is, the Chief Justice points out, clearly consistent with the possession of *majestas* by its Government in the capacity of mandatory; for the Union is not only a signatory to the Peace Treaty, but is a member of the League of Nations. The Union, therefore, has an international status which entitles its Government, when administering the territory as mandatory, to claim the attribute of *majestas* to the same extent as any other Power could if it acted in the same capacity. Therefore, a charge of high treason can lie in respect of an attack made upon it with hostile intent by any inhabitant of the mandated territory. As regards the form of the indictment, the fact that by the South Africa Act, 1909, the Executive Government of the Union of South Africa is vested in the King and is administered on his behalf by a Governor-General acting with the advice of the Executive Council appointed by the Governor-General under that Act, is sufficient, therefore, to support the allegation in the indictment that the accused owed allegiance to His Majesty George V in his Government of the Union.

In a concurring judgment, exhaustive of the whole subject of sovereignty and sovereign States and of the position created by the Treaty and the mandate and its incidence in regard to the crime of high treason, Sir John Kotze (Judge of Appeal) points out that the League of Nations cannot prescribe or dictate to the mandatory in regard to the making or repealing of laws which are to be in force in the territory or give directions in respect of the establishment of judicial tribunals and the administration of justice, or in respect of the appointment of officials or the raising or spending of revenue. Therefore, the mandatory has the full right and power of internal government and administration; and the existence of the particular restrictions and

obligations specified in the mandate in the exercise of the rights possessed by the mandatory cannot, and does not, destroy the essential character of those rights. Further, if the delegated authority of full powers of administration and legislation vests in the Government of the Union as mandatory, it necessarily follows that allegiance and obedience by all inhabitants are due to the laws and lawful directions of the mandatory, and that that implies sufficient *majestas* on which a charge of high treason can be founded. For, as the obligation to maintain laws and order rests on the mandatory, it is its duty to suppress all disturbance of these, to provide for the public safety and to punish offenders.

De Villiers, J. A., in a concurring judgment, answers the main question as follows:

> For the limitation of the exercise of sovereign rights in certain directions does not deprive the sovereign of *majestas* so long as there is no abdication of sovereignty in favour of another. For this proposition there is abundant authority in history. Once it is clear that a State possesses sovereign rights it is not considered to have given up its *majestas* unless it *recognizes* the sovereignty of another in its territory,

and he comes to the conclusion, after considering the terms of the Treaty and of the mandate, that as *majestas* or sovereignty over South-West Africa does not reside in the principal Powers of the League or the British Empire, that as no other sovereign over the territory is recognized by the mandatory Government, that Government, having full powers of administration and legislation, is possessed of *majestas*.

Wessels, J.A., puts the matter very succinctly thus: By the Treaty, Germany renounced all rights in respect of the territory. There is, therefore, no German sovereignty over the territory any longer. What has replaced it? It can only be: (1) The principal Allied and Associated Powers; or (2) the League of Nations; or (3) the Government of the Union of South Africa. The principal Allied and Associated Powers do not constitute a State or sovereign Power. Whatever the League of Nations may be, it is not a State, for it has none of the attributes of a sovereign Power; it is sufficient to say that, as a political institution, it is *sui generis*. The League, not being a State, *crimen læsæ majestatis* cannot be committed against it. As regards the Government of the Union, from the provisions of the Treaty and of the mandate, it is clear that the Government is not a mere agent, even though the term "mandatory" seems to imply that the mandatory acts as agent either for the Powers or for the League. The League, having once elected to hand over administrative and legislative powers to the Government of the Union, has no power to dictate to that Government what laws shall be made for the territory or how the territory shall be administered. The restrictions and the duty to report to the Council of the League are mere treaty obligations of the mandatory Government to the League.

From the summary here given of the judgments it will be seen that the question reserved was answered in favour of the prosecuting authorities.

THE ANTIQUITIES LAW OF PALESTINE.

[*Contributed by* NORMAN BENTWICH, ESQ., and F. M. GOADBY, ESQ.]

FORTHWITH, upon the establishment of Civil Government in Palestine in July 1920, the question of the promulgation of an Antiquities Ordinance was considered. There was indeed an elaborate Ottoman law, honoured more in the breach than the observance, as was not unusual with Ottoman legislation ; but it was desired to introduce not only changes of administration but changes in the principles of the law. The Archæological Joint Committee for the Middle East had proposed a draft which was intended to follow the principles stated in the Annex to Article 421 of the abortive Treaty of Sèvres and now reproduced in Article 21 of the Mandate for Palestine. This draft was taken as the basis for the new Ordinance, which was promulgated in October 1920. The principles on which the draftsman has sought to implement are as follows :

(1) " Antiquity " means any construction or any product of human activity earlier than the year A.D. 1700.

(2) The law for the protection of antiquities shall proceed by encouragement rather than by threat.

Any person who, having discovered an antiquity without being furnished with the authorization referred to in paragraph 5, reports the same to an official of the competent Department, shall be rewarded according to the value of the discovery.

(3) No antiquity may be disposed of except to the competent Department, unless the Department renounces the acquisition of any such antiquity.

No antiquity may leave the country without an export licence from the said Department.

(4) Any person who maliciously or negligently destroys or damages an antiquity shall be liable to a penalty to be fixed.

(5) No clearing of ground or digging with the object of finding antiquities shall be permitted, under penalty of fine, except to persons authorized by the competent Department.

(6) Equitable terms shall be fixed for expropriation, temporary or permanent, of lands which might be of historical or archæological interest.

(7) Authorization to excavate shall only be granted to persons who show sufficient guarantees of archæological experience. The Administration of Palestine shall not, in granting these authorizations, act in such a way as to exclude scholars of any nation without good grounds.

(8) The proceeds of excavations may be divided between the excavator

and the competent Department in a proportion fixed by that Department. If division seems impossible for scientific reasons, the excavator shall receive a fair indemnity in lieu of a part of the find.

The Ordinance established a Department of Antiquities under the control of a Director who is assisted in his administration of the law by an Advisory Board appointed annually to represent different national, religious and racial interests. The Board includes a representative of the French School of St. Étienne, of the Franciscan Order, the American School of Archæology, the British School, the Hebrew Archæological Society and the Government.

The Director since the Civil Government was established has been Professor Garstang, and his Chief Assistant has been Mr. Phythian-Adams, D.S.O., who is Curator of the Museum founded by the Department. There is one Senior Inspector (Mr. Guy) and several Junior Inspectors who see to the execution of the law throughout the country.

The Board is advisory only in character. The Director is required to consult it with reference to specified matters including all important excavations ; but is not bound by its advice.

The scope of the Ordinance is limited by a definition of Antiquity contained in Section 8 as " any object or construction made by human agency earlier than A.D. 1700." This definition is derived from the principles set out above. Special provision is, however, made (1) for the exclusion of objects in use for religious purposes ; (2) for the restriction of the application of the Ordinance by the exclusion of other classes of antiquities, in pursuance of public notices made by the Director with the consent of the High Commissioner and the Advisory Board (Art. 8). The Board has announced the exclusion of paintings and tapestries more recent in origin than the fourteenth century.

The Ordinance vests the property in all antiquities, discovered after it came into force, in the Government, and requires the finder forthwith to give notice of their discovery, but provision is made for rewarding a casual finder who reports his discovery in any case in which the find is not relinquished to him. Where antiquities are found in the course of authorized excavations provision is made for a fair division of the finds between the Government and the excavators. Under these powers the Government has claimed a splendid Greco-Roman sarcophagus unearthed accidentally near the site of Cæsarea: an Egyptian stele, one of two, dug up in the excavations at Beisan (the Biblical Bethshan and the Hellenistic Scythopolis).

The Ordinance requires all antiquities in private hands at the date at which the Ordinance came into force to be declared to the Department, and makes provision for the issue of certificates to holders of antiquities in Palestine which are intended to establish the lawful nature of the possession. It authorizes the confiscation of antiquities not in lawful possession as shown by a valid certificate. Upon information laid by an officer of the Department an order for seizure may be obtained from a

magistrate and confiscation ensues. The provisions of the Ordinance dealing with certificates of possession have, however, proved difficult in application and amendments are under consideration. The Ordinance itself provides special exemptions as regards antiquities in the possession of a foreign State or religious authorities and archæological institutions.

A section dealing with historical monuments directs that a Schedule of all sites which are believed to contain antiquities shall, as soon as practicable, be prepared and published by the Department. This Schedule was completed provisionally in September 1923, and contains 2,600 sites. Special provisions are made with reference to sites so scheduled both in their expropriation where this is requisite and as to rights of inspection and otherwise. In particular the Department is authorized to hand over the care and conservation of historical sites to approved Societies; and in pursuance of this power the care of certain mediæval buildings in Jerusalem has been handed over to the pro-Jerusalem Society, founded by the District Governor of Jerusalem, Sir Ronald Storrs. The provisions as to historical sites do not, however, apply to sites in the possession of a religious or ecclesiastical body and in actual use for religious purposes, though power of control as to additions thereto and as to inspection are given to the Department.

A special chapter of the Ordinance deals with control of excavations. These are only allowed in pursuance of permits issued by the Department as to which the Director is required to consult the Advisory Board. A section lays down the necessary conditions of such permits, and secures rights of control and inspection on behalf of the Department.

Under this power permits have been given to Dr. Fisher of the Pennsylvania University to excavate the Tell at Beisan, to Professor MacAlister of the Palestine Exploration Fund, and Capitaine Weil of Paris to excavate Mount Ophel immediately below the walls of Jerusalem; and to other Archæological Schools and Societies to carry out exploration in various parts of the country.

The sale and exportation of antiquities are carefully regulated.

Dealers must obtain a licence, and their shops are subjected to inspection and control. The Government has a right to pre-empt any antiquity offered for sale or for exportation and provision is made for a fair appraisement. To secure this right to the Government, permits to sell or licences to export are made necessary; special provisions are inserted modifying these requirements in case of imported antiquities and antiquities which the Government has relinquished to a finder.

Exportation of antiquities is not allowed save under permit from the Department, and a special tax is charged on exported antiquities of 10 per cent.

The Ordinance further contains a chapter punishing various forms of failure to comply with its provisions; failure to report discoveries, unlicensed trading in antiquities, unlicensed export and the like, unlicensed excavation or sounding. Acts of wilful or negligent destruction or

defacement are also punishable, as also the manufacture of forged antiquities.

The Director is specially authorized to lend antiquities, belonging to the Government, to learned Societies and Museums, and to authorize their export for such purpose.

Within the four years that have passed since the Ordinance was enacted the Department of Antiquities has not only obtained a complete record of all the archæological sites and all the archæological collections in the country, but it has laid the foundation of a Palestine archæological museum which will be fully representative of the most historical country of the world. So popular is this museum in Jerusalem that it is visited often by not less than 1,000 visitors in a day. It has acquired, under the powers of the Legislature, the most notable objects which have been unearthed in the diggings of the last four years.

THE CONSOLIDATION OF THE LAW IN VICTORIA.

[*Contributed by the* Hon. Donald Mackinnon, *formerly Commissioner for the Commonwealth of Australia to the U.S.A. and Attorney-General for the State of Victoria.*]

The people and Parliament of the State of Victoria in the Commonwealth of Australia, for many years, have taken special care of the form of their statute law. Some eight years ago, the writer gave an account in this *Journal*[1] of the consolidations which had taken place and, particularly, the consolidation carried out recently by Mr. Justice Cussen of the Victoria Supreme Court and accepted by the Legislature *in globo*. The earlier consolidations did not include the personal and local acts, nor did they attempt to repeal and re-enact a part of the statutory law over which that Legislature had complete control, namely, Ordinances and Statutes of England, Great Britain and the United Kingdom which, by virtue of an enactment of the reign of George IV, were brought into operation in the Mother Colony of New South Wales and so by inheritance into the Colony of Victoria after separation from the Mother Colony. It was considered, on the occasion of the consolidations of 1865 and 1890, that the requirements of the legal profession and the public would be met by adding to the volumes containing the Consolidated Acts two volumes, one containing all measures of a local or personal nature and another those Imperial Acts believed to be in force in Victoria by virtue of s. 24 of the Act, 9 George IV, c. 83. Consolidation has now been extended to this latter body of statute law by a measure of some historical and considerable practical interest.

The section referred to came into force in New South Wales on July 25, 1828. It provided that the laws and statutes in force in the realm of England on that day should be applied in the administration of justice in New South Wales so far as the same could be applied within the Colony. Power was given to the Governor by and with the advice of the Legislative Council by Ordinance to declare whether such laws are deemed to extend to and be in force in the Colony and to limit or modify such laws. Until such Ordinances were so made the Courts were to decide on the application of these laws in the Colony. Obviously some nice points in local applicability have from time to time arisen.

Many of these Imperial Acts have been modified and modernized by New South Wales and Victorian Councils and Parliaments. Where there has been a similar legislative purpose the Victorian Legislature has

[1] *Journal of Comparative Legislation*, New Series, vol. xvi, pt. 2, p. 220.

adopted the form and phraseology of amending British Acts. This practice has been due not only to the excellence of British draftsmanship, but to the obvious advantage in having the decisions of English Courts and the opinions of able text-writers on the meaning of identical language. What was a considerable body of Imperial Law, acquired in the way described in July 1828, has in the interval of nearly one hundred years been repealed and re-enacted largely on modern British lines; other Imperial Acts have been superseded by Acts of the local Legislatures covering the same ground.

It may be asked why, in a country where the Legislature is active, do we find these lingering remnants of ancient law? There are various answers. Some of these surviving statutes concern matters upon which men have irreconcilable differences of opinion, and governments are never willing to promote legislation which makes avoidable trouble in Parliament. Others deal with circumstances of infrequent occurrence; others are so worded that translation into modern language is neither easy nor safe; others are of doubtful application outside the realm of England.

The volumes of Imperial Acts published as part of the Consolidations of 1865 and 1890 consisted largely of Acts which had been declared by the Courts to be in force in Victoria or were plainly in force by virtue of the language of the Acts themselves. To be perfectly sure that provisions had not become part of the statute law under the Act of George IV—provisions which, perhaps, had disappeared from the English Statute Book—a practising lawyer might have a long search among books not generally available. Mr. Justice Cussen (now Sir Leo Cussen), whose self-imposed task of consolidating the statutes in 1915 was a monumental public service, rightly points out that his work, vast as it was, did not completely consolidate the enacted law in force in Victoria. He was not content with the publication of a volume of applicable Imperial Acts, as had been done on previous occasions. He was doubtless encouraged by the fact that Parliament had placed such confidence in the accuracy and faithfulness of his consolidation and by the additional fact that a Statute Law Revision Committee, who could advise Parliament, had come into existence. Accordingly, in lieu of publishing a volume of Imperial Acts, he drafted the Imperial Acts Application Act, 1922 (No. 3270), and the measure was passed by the Victorian Parliament. The scheme and effect of this ingenious piece of legislation are worthy of more than passing comment.

Taking the effect first, it is not a completed consolidation; it is only a step in a direction which must inevitably lead to an almost if not wholly complete consolidation, but it does bring into small compass, handy for public and profession alike, all the Imperial provisions which, in all human probability, remain as a residuum applicable to the State of Victoria by reason of an English Act framed ninety-six years ago. It is what might be called inchoate consolidation.

Shortly put, the scheme by which this improvement is effected is as follows: Upon the enactment of the Act No. 3270, the Imperial Acts found themselves reproduced as Victorian legislation in the Victorian Statute Book; they may be amended or repealed in the same way as any other Victorian legislation, they enter upon a process of local assimilation. His Honour has brought these Acts into his scheme of consolidation. It can be readily understood that some of the Acts in force in England in July 1828 depend, as to their applicability to Victoria, upon judicial opinions which may vary from "complete confidence to extreme doubt." Others obviously apply. These last presented little difficulty and are consolidated and set out in Part III of the Act as "Consolidating Provisions."

With regard to those that are not consolidated, those which are of greatest practical importance, some of them have been judicially approved as applicable, others seem likely to pass the judicial test, others again may fail. They are set out in their legal phraseology as transcribed enactments and they are given the same force and effect, if any, as they had at the commencement of the Imperial Acts Application Act, 1922 (No. 3270), which date is fixed as September 1, 1923.

Another class of Imperial Acts which are of small practical importance but which may or may not be applicable to Victoria, is set out in a separate list in the second schedule. The position is cleared up by repealing all Imperial Acts which were in force in England when the Act of George IV was passed save those which are transcribed or kept alive by name in the second schedule. There are carefully drafted saving provisions and power is given to the Governor in Council from time to time by proclamation to declare that any enactment which may have been overlooked is to be added to the transcribed enactments or included in the second schedule containing those which are in force but are of insufficient importance to be transcribed or set out at length. The scheme seems thoroughly workmanlike, and the Act itself will be an inestimable boon to the public and the legal profession.

Sir Leo Cussen has earned the gratitude of the people of Victoria for his remarkable work in consolidating the statute law of this State: not only for the size of the undertaking but also for the zeal, patience, skill and learning with which it has been carried through. Especially is this true of his latest work. The provisions of seven thousand more or less antiquated British Acts and the Acts and Ordinances of the Colonies of New South Wales and Victoria comprise no light reading, and to decide upon their applicability to the State of Victoria to-day is a heavy task. It was a big work worthily undertaken and leaves His Honour's countrymen under an obligation to him which they can never repay.

THE PRESENT SITUATION WITH REGARD TO THE PRIVILEGES OF FOREIGNERS IN THE NEAR EAST.

[*Contributed by* F. M. Goadby, Esq., *Director of Legal Studies to the Government of Palestine.*]

Abbreviations.—*O.B.* (*Official Bulletin* of the Egyptian Native Tribunals.) *Gaz. Trib.* (*Gazette des Tribunaux Mixtes de l'Égypte*).

The Ottoman Capitulations disappear under the Treaty of Lausanne, at least as regards subjects of States which are parties to the Treaty. So far as regards the subjects of these States, the contractual basis upon which their privileges rested no longer exists. This being so, it might be argued that no capitulatory privileges can now be claimed by them in any territory which was formerly part of the Ottoman Empire, *e.g.* Egypt. Foreigners enjoyed privileges in Egypt, Palestine, Syria, Iraq, Hedjaz, in virtue of the Ottoman Capitulations.[1] How can these privileges be regarded as still legally existent in Egypt if the Capitulations upon which they are based "have been abolished"? But the view taken by the Powers seems to be that the basis of the privileges was not the Treaties themselves, but the custom enacted under the Treaties. The Egyptian Government does not, it is believed, contend that any change in the peculiar position of foreigners in Egypt will result from the course of events in Turkey. Practice in the past seems to support the view that where territory is severed from the Ottoman Empire and placed under the administration of a Capitulatory Power the privileges of foreigners cease, but where the territory thus severed is under native sovereignty the privileges continue.

It is here proposed to consider the existing position of foreigners before the Courts in Egypt, Palestine, Syria, Cyprus, Iraq and Hedjaz, all of which have recently ceased to form part of the Ottoman Empire. Special reference will be made to Egypt and Palestine.

Egypt and the Capitulations.—In the Ottoman Empire generally the normal position was that in criminal matters, if the victim of the offence was a native, the Ottoman Court had jurisdiction, though the Consular dragoman had to be present and sign the judgment. The United States, however, claimed complete immunity for her citizens

[1] *E.g.* by Art. 5 of the Treaty of London, 1840, it is provided that Ottoman Treaties shall apply in Egypt in the same manner as in every other part of the Ottoman Empire.

from the Ottoman jurisdiction.[1] In civil matters a complicated system prevailed, but in principle the Ottoman Courts were competent if one of the parties was a native, though the presence of the Consular dragoman was necessary. Matters of personal status belonged exclusively to the Consular Courts of the person concerned.

This situation had been much modified in Egypt, owing perhaps to the backward state of the general organization of the country. The maxim *actor sequitur forum rei* was pushed to its logical conclusion. All civil and penal matters went before the Court (Consular or Egyptian) of the defendant. The problem presented by the immense increase of trade between East and West in the first half of the eighteenth century, which was in part solved in Turkey by the reorganization of the Turkish Courts, was solved in Egypt by an enlargement of the Consular jurisdiction. The principle *actor sequitur forum rei* thus became firmly established as governing the relations of natives and foreigners in Egypt.

The situation in Egypt was very inconvenient, and ultimately in 1867 a reform was carried out in agreement with the privileged Powers. This reform was the institution of Mixed Courts with civil jurisdiction in all matters between natives and foreigners and between foreigners of different nationality, and also with a limited criminal jurisdiction. The actual jurisdiction given is set forth in the Statute of Organization of mixed suits which will be referred to from time to time below.

As already stated, the new status of Egypt is not deemed to affect the privileges which foreigners enjoy in that country. These privileges rest now partly on custom and partly upon the Convention under which the Mixed Courts were established.

During the period of the British Protectorate it was intended to abolish the Consular jurisdiction and to unify the Courts of Egypt, and active steps were taken with a view to this change. A new Penal Code was drawn up and published and a body of draft laws upon other subjects were prepared under the direction of a Commission appointed to make the necessary arrangements. Finally, a draft Judicature Law providing for unified Courts was prepared. But the events of 1919 in Egypt put a stop to these activities. Now that Egypt is independent, she is left to negotiate with the foreign Powers for abolition of the special privileges.

The position, therefore, is that in Egypt foreigners are, in civil and commercial matters, now subjected to the jurisdiction of the Mixed Courts and to mixed law in suits between themselves and "natives," as also between themselves and foreigners of a different nationality. In criminal matters they are subject to their own Consular Courts and to national law, save as regards police offences and offences which concern the Mixed Courts themselves. And the Consular Courts have exclusive jurisdiction in matters of personal status (Statute of Organization of Mixed Suits, Title I, Art. 9; Title II, Arts. 6–8; Mixed Code, Art. 4). Before the recent political changes in Europe all, or almost all, Christian

[1] Young, *Corps de droit Ottoman*, vol. i, p. 253.

foreigners in Egypt were either subjects of States having Capitulations or were " protected " by some State having Capitulations. But the changes consequent upon the dismemberment of the Ottoman Empire, and finally the remaking of the map of Europe by the Treaties of Versailles, St. Germain and the Trianon have brought into existence a large number of Christian States which do not possess Capitulations and the position of the subjects of these States in Egypt is one of interest.

So far as criminal jurisdiction is concerned, as also the special privileges as to arrest and inviolability of domicile, it seems clear that the subjects of the new States formed out of the Ottoman Empire, *e.g.* Bulgaria, Serbia, cannot claim any privilege. A difficulty arises owing to the restrictive wording of the Decree of Reorganization of the Native Courts which provides (Article 15) that the new Native Courts are to have jurisdiction in all civil and commercial suits between " natives " and in penal matters as regards offences committed by " natives."

It is consequently arguable that only natives (*i.e.* Ottomans) could be tried by a Native Court. However, the Native Penal Code is expressly made applicable to all persons who commit offences in Egypt except those who are exempt from native jurisdiction in virtue of any law, treaty or custom (Article 1), and the Native Courts have not unreasonably asserted their penal jurisdiction over any foreigner in whose favour no capitulatory privilege exists. As long ago as 1895 this jurisdiction was asserted as regards Persians, and it has also been asserted as regards foreigners from whom the Consular Court has withdrawn its protection. It seems, therefore, that foreigners who do not benefit by the Capitulations are subject to Native Penal Law and to the jurisdiction of the Native Courts. There is no hardship in this ; the Native Penal Code is quite modern, and is, indeed, only a revised form of the French Penal Code and the Native Courts are properly staffed and orderly. Foreigners not benefiting by the Capitulations include now the subjects of the new European States—Poland, Lithuania, Esthonia, Czecho-Slovakia. People of these countries might indeed obtain " protection " by inscribing at the Consulate of some State which has capitulatory rights, but I am unable to say whether this method has been used.

As to civil jurisdiction the position is different. The Mixed Courts are active and vigorous. *Est boni judicis ampliare jurisdictionem* is a maxim which they have most faithfully followed in many directions. The scope of the mixed jurisdiction depends largely upon the interpretation to be given to the word " foreigner " in the Decree of Organization. Who are the " foreigners " whose suits with " natives " are subjected to mixed jurisdiction ? In the first place, it has been held that native subjects (Ottomans) who are " protected " by a foreign Power possessing Capitulations are foreigners for the purpose of establishing the mixed jurisdiction if the protection is recognized by the Egyptian Government.[1] Austrian protection no longer suffices to effect this result, since (1) the

[1] *Gaz. Trib.*, i, No. 119.

former protecting Power (Austria-Hungary) has ceased to exist, and (2) Austria has by the Treaty of St. Germain renounced capitulatory privileges in Egypt.[1]

But the most striking extension of mixed jurisdiction arises from the interpretation put upon the word " foreigner " in the Decree of Organization of mixed suits.

The Mixed Courts have with increasing vigour asserted that their jurisdiction extends over civil and commercial suits between natives and foreign subjects and between foreigners of different nationality, even though the foreigner is not the subject of a State possessing Capitulations or which has acceded to the " Reform," *i.e.* to the establishment of the Mixed Courts.

" The adhesion of a State to the agreement instituting the Mixed Courts is not requisite in order that its subjects may enjoy the rights of foreigners under the Mixed Courts. From the beginning the Mixed Courts have held that the Mixed Courts have competence as regards all foreigners, even though their Government took no part in instituting the Courts " (*per* Halton, J., in *Gaz. Trib.*, ii, No. 160, where the position of a Swiss not inscribed at any Consulate was considered). The bulk of the mixed jurisprudence is to this effect. It might well have been supposed that the Powers which, in co-operation with the Egyptian Government, established the Mixed Courts were making provision only for the litigation of their own subjects. In effect the Courts thus created are now to be Courts of general jurisdiction whenever foreign interests are concerned.[2]

There have, however, been dissenting voices. Mr. Vaux, for example, a highly esteemed English judge, now a member of the Mixed Court of Appeal, held in 1914 that Bulgarians must be treated as " natives," not " foreigners," for the purpose of application of law in Egypt, and laid down broadly that only foreigners who were subjects of Powers which have acceded to the establishment of the Mixed Courts and which possess Capitulations can be deemed to be foreigners within the meaning of the Statute of Organization of Mixed Suits.[3]

Nevertheless, the " jurisprudence " may now be regarded as " fixed " in the sense that the word " foreigner " must be interpreted in its natural sense as including at least subjects of any State foreign to Egypt. The latest decision upon the point is interesting as referring to a person who, having been previously a subject of a State having Capitulations (Austria-Hungary), had, as a consequence of the rearrangements following upon the war, become the subject of a State which had no Capitulations (Yugo-Slavia). It involved also a conflict between the Mixed and the Native Courts.

[1] *Gaz. Trib.*, xiii, No. 91. It seems to be assumed that this renunciation is effective in Egypt, though it was as regards Egypt *res inter alios acta*.

[2] So also by their theory of the mixed interest the Mixed Courts have practically monopolized jurisdiction in bankruptcy and company matters. See, for this, Scott, *Law affecting Foreigners in Egypt*, pp. 220 ff.

[3] *Gaz. Trib.*, v, No. 111.

The Egyptian Ministry of Foreign Affairs had given a certificate stating that the plaintiff, a certain Dame Stockora, was a "local subject," and following upon this an action was brought against her in the Native Courts. One gathers that the certificate in question did not so much mean to assert that Mme. Stockora was an Egyptian as that she was a local subject for the purpose of determining jurisdiction. At any rate, the fact that she was really a Yugo-Slav does not seem to have been contested. The Mixed Courts, in proceedings brought by her to obtain relief, held that the certificate of the Egyptian Ministry was not conclusive, and that in fact the plaintiff was a Yugo-Slav.[1] It was objected that Yugo-Slavs were not subjects of a State benefiting by the Capitulations, but the learned judge (M. de Herreros) pointed out that the Mixed Courts have uniformly asserted their jurisdiction over non-Ottoman foreigners of every nationality, and in particular Persians and Moroccans. He remarked that Yugo-Slavia was formed by the union of several nations which formerly enjoyed the benefit of the Capitulations, and concluded that this benefit could not now be refused to subjects of the new State formed by the union. Admitting that the plaintiff Yugo-Slavian was subject to the native penal jurisdiction, yet this would not prevent the Mixed Courts asserting their jurisdiction in civil and commercial matters.

The Mixed Courts, however, decline up to the present to treat Ottomans as "foreigners." Prior to the war Ottomans were certainly "natives" in Egypt, since Egyptians themselves were technically Ottoman subjects. But by the declaration of a British Protectorate in Egypt the country was severed from the Ottoman Empire. And now that Egypt is an independent State the difference of nationality is abundantly clear. In a case before the Mixed Court of Appeal in 1919 it was, however, laid down that "The status of Ottoman subjects not having been modified by the proclamation of a British Protectorate in Egypt, such persons, whether they reside in Egypt or not, must be regarded as 'natives,' and suits between them and Egyptians are consequently not within the mixed jurisdiction."[2] And, as will be more fully explained later, the same attitude appears at present to be adopted towards inhabitants of the new Arab States carved out of Ottoman Territory—Palestine, Syria, Iraq, Hedjaz.

So also the Mixed Courts decline to treat as "foreigners" Ottoman subjects resident in territory under foreign military occupation, since the military occupation of Ottoman territory by a foreign Power does not

[1] The much-vexed question whether the Mixed Courts are competent to decide the preliminary question as to the nationality of a suitor, upon which their jurisdiction is founded, appears to have been finally settled in the affirmative by the decision in the Saliha Hanoum case (*Gaz. Trib.*, iii, No. 428). Nationality, it is held, is not a question of personal status within the meaning of Article 4 of the Mixed Civil Code. See fully Arminjon, *Étrangers dans l'Empire Ottoman*, pp. 146 ff.

[2] *Gaz. Trib.*, x, No. 106. See, *contra*, *Gaz. Trib.*, vi, No. 280 (Commercial Court of Cairo).

alter the status of the inhabitants.[1] But Cypriots are undoubtedly "foreigners" in Egypt, since they have become British subjects in virtue of the annexation.[2]

It should be remarked that the Native Courts have shown a disposition to contest the jurisdiction claimed by the Mixed Courts in suits between Egyptians and such foreigners as do not belong to capitulatory States or are protected by any capitulatory State.[3] It has been suggested that both Native and Mixed Courts are competent if the foreigner does not belong to a capitulatory State.

In a case before M. de Herreros in 1919, *Gaz. Trib.*, ix, No. 155, the judge laid down that the Native Courts were not radically incompetent where foreigners not the subjects of a capitulatory State were concerned (*e.g.* Persians). If, therefore, the foreigner submitted to the native jurisdiction he could not afterwards complain. The same judge, in the later case quoted above (*Gaz. Trib.*, xiv, No. 33), appears to have considered the Native Courts as radically incompetent with reference to Yugo-Slavians in civil and commercial matters, basing his decision on the apparently irrelevant circumstance that some Yugo-Slavians were formerly subjects of a capitulatory State, *i.e.* Austria-Hungary.

In relation to *criminal* jurisdiction of the Mixed Courts, however, only persons who are subjects of capitulatory States are to be deemed "foreigners." In a case reported in *Gaz. Trib.*, ix, No. 38, an Ottoman (as opposed to an Egyptian) subject was convicted of an offence within mixed jurisdiction and appealed against the conviction on the ground that the convicting Court was not constituted in the manner required for the trial of foreigners. The Court of Appeal upheld the conviction, holding that the special arrangements made for the protection of foreigners in such case were strictly reserved for foreigners who enjoyed capitulatory privileges and could not be claimed by Ottomans, even though Ottomans might now be deemed foreigners in Egypt.[4]

Consular and Diplomatic Agents were secured complete immunity from mixed jurisdiction by conventions made between Egypt and the Powers relative to the establishment of the Mixed Courts. This immunity has been modified by a Decree of May 1, 1901, made with the consent of the acceding Powers. This Decree provides that all diplomatic or consular officials sent from abroad to Egypt, as also their families, are competent to sue, but not to be sued, before the Mixed Courts. But they are justiciable before these Courts, both in commercial matters and as regards

[1] *Gaz. Trib.*, v, No. 190 (Chians); viii, No. 397 (Albanians); xiii, No. 103, (Rhodians).

[2] Order in Council, November 5, 1914. But see *Gaz. Trib.*, x, No. 71, where, however, the plaintiff, though Cypriot by origin, did not become British under the Order in Council.

[3] See *O.B.*, ii, No. 43 (Moors); *O.B.*, xx, No. 68 (Bulgarians); *contra*, *O.B.* xxii, No. 83 (Persians).

[4] But (*semble*) Christian Europeans not now the subjects of a State having Capitulations could claim the protection of these arrangements.

immoveable property where their official functions are not involved. It is not clear whether the Decree must be taken to extend to all such persons whether representing a State which has acceded to the " Reform " and still possesses capitulatory privileges or one which has no capitulatory rights. Historically, no doubt, it should be interpreted as referring only to the former—but its language is general, and does not suggest any restrictions.[1]

Neither the Native nor the Mixed Courts have jurisdiction in matters of *personal status*. Foreigners benefiting by the Capitulations are justiciable in such matters before their Consular Courts. But unless there is a Capitulation the Consuls have no jurisdiction, and it is not easy in Egypt to find any Court of personal status which has residuary jurisdiction. It is true that, as regards native subjects, the Moslem Religious Courts have always claimed such residuary jurisdiction, and frequently exercise it, even as regards native subjects protected by a foreign Power.[2] But the Moslem Courts have never claimed jurisdiction over non-Moslem foreigners, though in certain cases it has been maintained that Moslem law is the common law of personal status in England. Thus in the much-criticized case of *In the Goods of Torrey Grant*, before the British Consular Courts in Egypt in 1907, the Moslem law of inheritance was held applicable to determine the succession to land in Egypt, apparently on the ground that this law was the *lex situs*. And in the curious case of *Nahas* v. *Cassab* (*Gaz. Trib.*, ix, No. 289) the Mixed Court of Cairo held that a marriage between French Christians celebrated in Moslem form was valid as being in accordance with the local law. But such cases are exceptional and doubtful. A practical answer must be found. In the case of Persians, a Treaty dating from 1875 between Turkey and Persia authorizes Persian Consuls to take charge of successions of Persians who have died in the Ottoman Empire.[3] This species of non-contentious jurisdiction might be extended to other foreigners even where full capitulatory privileges are not recognized. It is understood that at the present moment in Egypt the consular authorities of non-capitulatory States do in fact deal with matters of personal status relating to subjects of their respective countries. But the legality of any such jurisdiction is undecided.

Before concluding this summary of the position of foreigners in Egypt reference should be made to the situation of Russians and of subjects of the late enemy States (Germany, Austria-Hungary). As regards Russians, it appears that for some time after the Revolution the Russian Consul continued to administer justice to Russian subjects on the basis of the Czarist law and in the name of the Czar or in the name

[1] In *Gaz. Trib.*, iv, No. 100, the Mixed Courts interpreted the Decree in another connexion strictly by reference to its history. See Goadby, *Egyptian Criminal Law* (Cairo, 1924), p. 53, and note.

[2] Cf. *Bulletin de Législation et Jurisprudence*, xi, 199, where the position of an Ottoman subject protected by France, and at the same time a Catholic of the Latin rite, is considered.

[3] For the interpretation of the Treaty see a case in the *Gaz. Trib.*, viii, No. 339.

of the Law. And the Mixed Courts declined to treat the Russian Consular jurisdiction as non-existent. In a case before these Courts, May 15, 1923 (*Gaz. Trib.*, xii, No. 297), it was laid down that " Though it is true that following upon the events arising from the war the position of the Russian Consular Courts in Egypt is abnormal, particularly as regards appeal, yet one ought not to find a remedy for the strange state of affairs by treating as null an international agreement." A " decision " of the Council of Ministers issued October 11, 1923, declares, however, that the Egyptian Government declines to recognize the Russian diplomatic and consular representation " formerly established in Egypt." For the moment, therefore, Russian subjects are deprived of capitulatory rights, though they remain foreigners for the purpose of mixed jurisdiction. Recognition by Egypt of the Soviet Government would presumably lead to a re-establishment of capitulatory rights—if the present Russian Government could bring themselves to claim such anti-national privileges.

Late enemy States also occupy an abnormal situation.

By Article 149 of the Treaty of Versailles, Germany agreed with the Allied Powers that in Egypt provision should be made by decrees of the Sultan of Egypt for exercise of jurisdiction over German nationals and property by the British Consular Courts. Austrian and Hungarian subjects are in the same position (Treaty of St. Germain, Article 104 ; Treaty of the Trianon, Article 88).

No definite provision has yet been made, but it is understood that future arrangements are now under discussion between the Governments concerned and the Egyptian Government.

In the meantime, Russians, Germans, Austrians and Hungarians are treated as " foreigners " for the purpose of mixed jurisdiction.

The Position of Palestinians in Egypt.—The position of Palestinians in Egypt now that Palestine has been definitely separated from the Ottoman Empire by International Treaty and the British Mandate has been proclaimed is worthy of consideration.

1. It is understood that Palestinians will not be deemed to be protected British subjects so as to come within the jurisdiction of the British Consular Courts.

2. If this be granted we must assume that as regards criminal offences Palestinians in Egypt will be subject to the Native Courts which have on several occasions claimed penal jurisdiction over foreigners in Egypt who do not enjoy the privileges of the Capitulations.

In civil matters the Mixed Courts would on any interpretation have civil jurisdiction in disputes between Palestinians resident in Egypt and foreigners. A difficulty, however, exists in cases of suits between Palestinians and Egyptians or Ottoman subjects. Are Palestinians " foreigners " in Egypt for the purpose of mixed jurisdiction ? Up to the present the Courts have not recognized that subjects of States detached from the Ottoman Empire as a consequence of the Great War are foreigners —they appear to treat them as Ottoman subjects.

Obviously this cannot last. Egypt is independent of Turkey, as are also Palestine, Syria, Mesopotamia and Hedjaz. Palestinians are foreigners in Egypt, and though it may be said that many of them were once Ottoman subjects, this, if material at all, could hardly be made a ground for a distinction. To maintain that all Palestinians are " natives " in Egypt because most Palestinians were once Ottoman subjects would be illogical. Consequently, the Courts may be forced to the view that all Palestinians are foreigners in Egypt so far as regards the jurisdiction of the Mixed Courts, although they would presumably be treated as " natives " so far as regards the penal jurisdiction.

A very recent decision of the Mixed Courts of Alexandria (*Gaz. Trib.*, xiii, No. 341) lays down that the existence of a French Mandate over Syria has not destroyed the Ottoman nationality of Syrians, and that the fact that a Syrian produces a French passport is not proof of a new nationality. The learned President seems to have argued that since the Ottoman Law of Nationality of 1869 was still applicable in Egypt,[1] the Mixed Courts were bound to continue to treat all persons who would be Ottoman subjects under the law as " local subjects " for the purpose of mixed jurisdiction. The argument appears to be somewhat odd. With great respect it is submitted that a very clear distinction should be drawn between the application of the principle upon which nationality is acquired under the Ottoman law and the application of the results. In the absence of any new law of nationality it seems that the acquisition of nationality in Egypt, Syria and Palestine is still regulated on the principles laid down in the Ottoman law of 1869. But the nationality thereby acquired is not now Ottoman, but Egyptian, Syrian or Palestinian.[2]

But, however this may be, the decision tends to indicate that, at least as soon as there are distinct laws of nationality in Egypt, Syria and Palestine, the citizens of Syria and Palestine will be deemed to be foreigners in Egypt.

In matters of personal status, if the British Consular Court is to be ruled out, one must assume that the competent Religious Courts in Egypt—Moslem, Christian and Jewish—will have jurisdiction as regards Palestinians, seeing that in Palestine itself the Religious Courts are competent in these matters (Palestine Order in Council, Articles 51–54).

Privileges of Foreigners in Palestine.—Palestine, as a part of the Ottoman Empire, was formerly a territory within which the Ottoman Capitulations applied. But the position has been changed by the British occupation and Mandate.

In the Mandate for Palestine it is provided that the immunities and privileges of foreigners, including the benefit of consular jurisdiction and protection as formerly enjoyed by Capitulations or usage in the Ottoman Empire, are definitely abrogated in Palestine. The mandatory is responsible for seeing that the judicial system in Palestine assures to foreigners as well as to natives a complete guarantee of their rights.

[1] Cf. *Gaz. Trib.* xiii, No. 339.

[2] Cf. *Gaz. Trib.* xiii, No. 338.

The United States of America insists, however, upon the privileges of her citizens in Palestine. It is difficult to understand the basis of the claim. And, apart from legal technicality, the attitude of the United States Government is surely unjustifiable. The privileges were founded upon the peculiar character of Turkish justice. The United States has consented to abolish the privileges in Turkey itself, and yet asserts the need for their continuance under a British Administration in Palestine.

Apart from the bizarre privileges claimed for American citizens and a very limited non-contentious jurisdiction in matters of personal status allowed to foreign Consuls, the only relics of the Capitulations in Palestine are those defined in Articles 60–63 of the Palestine Order in Council, 1922, as amended by Proclamations of April 27, 1923. The foreigner has a right generally to be tried by a British judge or by a Court of which the majority are British judges. In civil cases he may claim that one member of the Court shall be British, and in certain cases that the majority shall be British. Search warrants against foreigners must be issued only by a British magistrate.

The privileges are, therefore, very attenuated. Moreover, the Order in Council does not grant these privileges to all foreigners, but only to such foreigners as come within the rather peculiar definition of foreigner stated in Article 59. According to this definition, "foreigner" includes all nationals or subjects of European or American States, or of Japan, but does not include native inhabitants of States protected by or mandated to European States (*e.g.* Syrians, Mesopotamians), Ottomans or persons who have lost Ottoman nationality without acquiring another nationality.

The definition is clearly intended to include all foreigners (with the addition of Japanese) who previously enjoyed privileges under the Capitulations either as being subjects of States possessing Capitulations or as being foreigners protected by such States. The Japanese have been given the same status because they have so completely adopted European civilization.

Claims to be treated as foreigners must be made *in limine litis*. But the Court trying the action is (*semble*) competent to adjudicate upon the claim, whether there are British members or not.

The following points should be noted:

(1) Ottoman or Egyptian subjects under the civil protection of a foreign Power are not "subjects" of the foreign State, and do not therefore enjoy the foreign privileges in Palestine.

(2) The native inhabitants of a territory protected by a State having Capitulations were entitled to the privileges of the Capitulations. But such persons are not to be deemed "foreigners" under Article 59 of the Order in Council for the purpose of claiming foreign privileges in Palestine. The situation is the same as regards native inhabitants of a mandated territory. Thus Syrians, Mesopotamians, natives of Zanzibar, New Guinea, Tanganyika Territory, are not foreigners under Article 59. Query

as to native inhabitants of Indian Native States which are protected only. Natives of British India proper are clearly foreigners. The term "protectorate" includes such very different relations between the protecting Powers and the protected State that it is difficult to know exactly what the word means, in some connexions.

(3) "Subjects of American States" include the subjects of all States in America, North or South, *e.g.* Peru, Bolivia, Argentine, Mexico.

(4) British subjects from any part of the world have the privileges whether they belong to a European part of the Empire or not, *e.g.* Maltese, Cypriots, South Africans, West Africans, West Indians, Australians, etc. So also have French citizens or subjects, *e.g.* Algerians. But not Moroccans or (*semble*) Tunisians.

(5) These privileges are enjoyed whatever the religion of the person may be. Moslem British subjects are equally entitled with Jews or Christians.

Contentious jurisdiction over foreigners in matters of personal status is reserved for the Civil Courts, which are directed to apply the national law of the party. If, however, the national law imports the law of the domicile the Courts are to accept the Renvoi (Order in Council, Article 64). But if the foreigner is a Moslem the Moslem Religious Court has exclusive jurisdiction in any matter of personal status, and it is competent for foreigners who are not Moslems to carry their dispute before a Religious Court of their own community in any matter of personal status, provided all the parties consent (Article 65). These provisions raise many difficult questions, but their discussion cannot here be undertaken.

Trans-Jordan.—The arrangements made by the Order in Council do not extend to Trans-Jordan. The International position of Trans-Jordan is indeed peculiar and somewhat vaguely defined. By Article 25 of the Mandate for Palestine it is provided that in the territories lying between the Jordan and the eastern boundary of Palestine "as ultimately determined," the Mandatory may, with the consent of the League of Nations, postpone or withhold application of such provisions of the Mandate as he considers inapplicable. It is not, however, proposed or agreed to postpone or withhold the provisions of Articles 8 or 9.[1] Consequently, the Capitulations are not applicable in Trans-Jordan, and the Mandatory is responsible for seeing that the judicial system of Trans-Jordan assures to foreigners as well as to natives a complete guarantee of their rights. In fact, a British representative resides at Amman, the capital of Trans-Jordan, but I am not aware of any other steps taken to secure that the judicial system of Trans-Jordan assures to foreigners a guarantee of their rights.

Privileges of Foreigners in Cyprus.—The Capitulations are not applied, and have not been applied, since the British occupation. The Cyprus Court of Justice, Order in Council of 1882, established a system which

[1] See Memorandum by British Representative at the League of Nations presented to the Council of the League, September 16, 1922.

still prevails under which every Court or judge exercising civil jurisdiction in an Ottoman action or exercising criminal jurisdiction where an Ottoman subject was accused applies Ottoman law as modified by Cyprus Statute Law, and every Court or judge exercising civil jurisdiction in a foreign action or exercising criminal jurisdiction in a foreign action or exercising criminal jurisdiction where a person, not being an Ottoman subject, is accused, applies English law as modified by Cyprus Statute Law. In actions relating to immoveable property Ottoman law, as so modified, is always to be applied.

An Ottoman action means an action in which the defendant is an Ottoman, and a foreign action means one in which the defendant or any defendant is not an Ottoman subject.

The annexation of Cyprus in 1914 changed the status of resident Cypriots, who ceased thereupon to be Ottoman subjects and became British. Consequent upon this, further Orders in Council were issued. By an Order of December 21, 1917, it was provided that the Cyprus Courts of Justice Order, 1882, should be read as though the words "Cypriot action" were substituted for "Ottoman action" and Cypriot action was defined as meaning an action "in which the defendant is, or all the defendants are, persons who, being Ottoman subjects, became, or shall become, or who being the children of such persons shall become British subjects in virtue of the Cyprus (Annexation) Order in Council, 1914, 1915." Ottoman law as modified by Cypriot statutes is to continue to be applied in Cypriot actions, except that in prosecutions for treason and sedition English Law is to be applied. A later Order in Council (October 11, 1921) provides that for the purpose of the Cyprus Courts of Justice Order of 1882 English law is to mean the common law and rules of equity and the statutes of general application in force in England on November 5, 1914. The position in Cyprus is, therefore, somewhat odd. British subjects other than Cypriots, and all foreigners in Cyprus, have the right to the application of English law in an action in which they are defendants (except as to immoveable property) and in any criminal prosecution against them. They have also the privilege of being tried by British judges. These privileges are not limited to subjects of the former Capitulatory States, and the provisions of the new Orders in Council have extended them impliedly to Ottoman subjects and to the subjects of States recently carved out of the Ottoman Empire, *e.g.* Egypt, Palestine, Syria. Actions or prosecutions against such persons would be "foreign," consequently English law would be applied. As regards Palestinians, this result is particularly bizarre. In Palestine, as in Cyprus, the Ottoman law is retained as common law, because it is familiar to the people and supported by traditional feeling. Yet the Palestinian in Cyprus is by way of special privilege exempted from the application of what may be termed his national law, and finds his rights and duties regulated by a foreign system (English). So also of the Turk and the Syrian.

The Privileges of Foreigners in Syria (French Mandate).—The French Mandate of Syria contains an article abolishing capitulatory privileges in Syria and the Lebanon, but providing that until the new judicial organization is put into force Consular Courts shall continue and that the privileges shall be re-established when the Mandate comes to an end, except as regards subjects of Powers which have renounced them.

The final confirmation of the French Mandate last year brought this article into operation, and a series of Arrêtés have been promulgated (July 1923), making provision for the trial in cases in which one of the parties is a foreigner. By these Arrêtés it is required that in all civil, administrative, commercial and criminal actions in which one of the parties is a foreigner, the Court trying the action shall be presided over by a French judge. If, *in limine litis*, one of the parties so demands, the Court is to be composed of a majority of French judges. It is further provided that in all such actions the State Representative (Ministère Public) shall be French. Judgments in civil, administrative and commercial matters and sentences to fines in criminal cases are in the like circumstances to be executed by a French bailiff (*huissier*). The preliminary investigation (*instruction*) in criminal matters is to be conducted by a French examining judge (*juge d'instruction*). A later Arrêté (March 1924) expressly provides that the determination as to whether a person is of foreign nationality for the purpose of the application of these provisions is to rest, not with the Court, but with the " Bureau des Nationalités du Haut Commissariat."

It is to be remarked that by these Arrêtés the exceptional security of French judges and officials is extended to all persons of foreign nationality without distinction, and the rights thus given can apparently be claimed not only by subjects of States which formerly enjoyed Capitulations, nor only by subjects of European and American States, but by all foreigners, *e.g.* Egyptians, Turks, etc. The range of foreign privilege in Palestine is, as remarked above, less wide. But in Cyprus such privileges as exist extend to all foreigners without distinction. The Syrian Arrêtés make no reference to matters of personal status. Judging, however, by the well-known principles of French law on this matter, it may be assumed that the Courts will apply the national law of the parties.

Privileges of Foreigners in Iraq.—Article 5 of the Mandate provides that the privileges and immunities of foreigners, including benefits of consular jurisdiction as formerly enjoyed by Capitulations or usage in the Ottoman Empire, are definitely abrogated in Mesopotamia. Article 6 states that the Mandatory is to be responsible for seeing that the judicial system established in Mesopotamia safeguards (*a*) the interests of foreigners ; (*b*) the law. By Article 9 of the Treaty of October 10, 1922, the King of Iraq undertakes to accept such reasonable provisions as His Britannic Majesty may consider necessary to safeguard the interests of foreigners in consequence of the non-application of the Capitulations. These provisions are to be embodied in a separate agreement, pending

which a working rule has been adopted whereby foreigners are secured the presence of a British judge in all serious matters.

Privileges of Foreigners in Hedjaz.—The preliminary draft of the Anglo-Arab Treaty which was published in June, 1923 contains provisions with reference to the protection of the interests of British subjects within the territory of His Hashimite Majesty (Articles 11–16).

Article 11 provides for the handing over to the British Representative in Hashimite territories of the property of British subjects who may die in His Hashimite Majesty's territory; such property to be disposed of in accordance with the law applicable to the case.

Article 12 provides for the attendance of a British Consular Representative in the Hashimite Courts during the hearing of a case in which a British subject is plaintiff or defendant, and for adjournment of any judgment in the event of the British agent desiring to make representations on the ground of equity. The provisions of this article do not apply in the case of British subjects or persons enjoying the protection of His Britannic Majesty who are habitually resident in Hashimite territory.

Article 13 provides for the handing over by His Hashimite Majesty to the British Consular Authority of British subjects arrested by the Hashimite authorities, provided that British Consular Authorities give security for their appearance when required.

The provisions of this article do not apply in the case of British subjects habitually resident in Hashimite territories outside Jeddah or other seaports in which His Britannic Majesty may appoint consular agents.

Article 14 provides that cases between British subjects in which interests of Hashimite subjects are not involved shall be tried by the British Consular Authority.

Article 15 provides for the surrender by His Britannic Majesty of all privileges and immunities other than as provided in this Treaty hitherto enjoyed by British subjects in virtue of the Capitulations between Great Britain and Turkey.

Article 16 provides for the notification by His Hashimite Majesty of the British agent when he desires the deportation of a British subject.

IMMUNITY OF STATE SHIPS.

[*Contributed by* C. R. DUNLOP, ESQ., K.C.]

THE question of the immunity of ships owned by a State from the jurisdiction or liabilities to which private-owned ships are subject, and whether such immunity ought to be abolished or modified, has become one of great importance. Before the Great War, state-owned ships were mostly confined to warships and ships employed solely in the public service of the State. But during and since the war States, recognizing the national service which ships other than ships of war render or are capable of rendering in time of war or peace, have come to own and employ ships for a greater variety of public purposes and also for ordinary commercial purposes. During the war the British Government acquired by building or purchase a large fleet of merchant ships, and so did the Government of the United States of America, acting through and in the name of the United States Shipping Board. Other States also became owners of merchant ships ceded to the Allied Governments by Germany under the provisions of the Treaty of Versailles. The Government of the Union of Soviet Socialist Republics in Russia maintains its claim to be the owner of the ships of the Russian commercial fleet nationalized by a decree dated January 26, 1918. The proposed Anglo-Soviet Treaty of Commerce and Navigation contains provisions recognizing that such ships are national ships, and that the monopoly of foreign trade belongs to the Government of the Union and may be conducted by a Trade Representative of the Union and his assistants, who are to possess all the immunities of a Sovereign or his Ambassadors.

In 1899 Dr. Matsunami, a distinguished jurist with a reputation not confined to Japan, where he is legal adviser to the Japanese Government and Admiralty Minister and a Professor of Tokyo University, proposed in London at a meeting of the International Maritime Law Conference a resolution that in the case of a collision between a warship and a merchant ship the State to which the warship belongs should, if the warship were to blame for the collision, pay the damages according to the general principle of the maritime law. Since 1899 the subject of the immunity of State-owned ships has received the wide attention which Dr. Matsunami has drawn to it by his writings and speeches, and has assumed a far greater importance than it then had. Resolutions in favour of the abolition of such immunity were passed in 1922 at the London Conference of the Comité Maritime International, and in the following year at the

Gothenburg Conference. The Resolutions in substance were that vessels owned or operated by a State and the State should be subjected to the same rules of liability as those applicable to private-owned ships, and that such liability should be enforceable by the tribunals having jurisdiction over private-owned ships or their owners, except in the case of warships and other vessels owned or operated by a State and employed in governmental non-commercial work. In that case the liability should be enforceable only by action in the tribunal of the State owning or operating the vessel in respect of which the claim arises. Dr. Matsunami has recently written a book entitled, *Immunity of State Ships*,[1] in which he strongly advocates the abolition of the immunity and the adoption by the Maritime States of the principles involved in the Resolutions. The object of the book, as the learned author states in the preface, is to render more easy the difficult task of inducing the Governments concerned to change their municipal laws in accordance with the Resolutions. The book should enlighten public opinion. It merits the claim made by the author that it is the first book on the subject in any language, and amply warrants the hope which he expresses with modesty and diffidence that it may contribute towards the unification of the laws on the subject among the maritime nations of the world.

Most of the book is devoted to a critical examination of the law of England on the subject of the immunities of Sovereigns or States and their property, and in particular of State-owned ships. A chapter is devoted to the laws of other maritime nations; but it is regrettably brief, and is less instructive or illuminating. To many English lawyers the law of England as to the immunity of State-owned ships is puzzling and in some respects obscure. The theory of the law and its application in practice appear to be inconsistent. A confusion of ideas is apt to creep into discussions on the subject and into criticisms of the opinions of other lawyers. According to the common law of England no action can be maintained in any Court administering English law against the British Sovereign in his private or public capacity or against the British Government or any department of the Government as representing the Sovereign. But if a wrong or tort is committed by any officer or servant of the Sovereign he is personally liable to the injured party, and it is no defence to an action brought against him in an English Court that the wrongful act complained of was done by him in the course of his public duties. He is liable to the injured party, whether the latter is a British subject or an alien, subject to this difference only that if the act complained of was an act of State done with the authority of the British Government, or afterwards duly ratified by the Government, no action can be maintained by an alien, although it would be maintainable in these circumstances by a British subject. By various statutes, however, the British Sovereign or departments of the British Government may be sued

[1] *Immunity of State Ships*, by Dr. N. Matsunami. London: Richard Flint & Co., pp. xv + 208.

in respect of claims to which the particular statute relates and subject, as regards procedure, to its special provisions. The most important of such statutes is the Petitions of Right Act, 1860, under which legal proceedings may be taken against the British Sovereign to recover any debt for goods supplied to the Crown or for the public service, or damages for breach of a contract made on behalf of the Crown by any department of the Government or any servant of the Crown. The Act, however, unlike some of the corresponding Statutes or Ordinances in the British Colonies, does not apply to any claim founded on a tort committed by any servant of the Crown. Any person injured by a tort is left to the common law remedy.

Accordingly, if a British warship or any other ship belonging to the British Sovereign or any department of the British Government causes damage by collision or otherwise to a private ship owned by a British subject or an alien, the owner of the private ship cannot bring any action or petition of right against the Sovereign or the Lords Commissioners of the Admiralty or any other department of the British Government, or any legal proceedings against the offending ship. But he may bring an ordinary action of tort against the officer who was in charge of the ship and obtain a judgment against him for the amount of the damage caused by the State-owned ship. In practice the Lords Commissioners of the Admiralty, representing the Crown, ascertain and give to the owner of the private ship who is desirous of bringing such action the name of the proper officer to sue. A writ may then be issued against the officer named, and the Treasury Solicitor, who conducts litigation in such cases on behalf of the Crown, accepts service of the writ. If the ship belonging to the Crown has sustained damage and the question which ship is to blame for the collision is in dispute, a writ may be issued by the Treasury Solicitor on behalf of the Lords Commissioners of the Admiralty against the private ship *in rem* or her owner *in personam*. The two actions, the one by the private owner against the officer of the Crown, the other by the Crown against the private owner, may be tried together, or one action may be stayed or postponed to abide the result of the other. The questions which arise during such litigation as to whether the claim against the officer of the State-owned ship should be paid or compromised or contested in Court, and how the litigation should be conducted, are decided by the Lords Commissioners of the Admiralty or their legal advisers. The litigation is conducted at the expense of the Government. The question of liability is decided as between the two colliding ships in the same way as in cases of collision between two private-owned ships. If judgment is given against the officer in charge of the State-owned ship the Government pays the damages on the same basis as if the ship were private-owned. Frequently in cases where damage is alleged by private persons to have been caused wrongfully by naval officers, the Lords Commissioners of the Admiralty agree to submit the claim to arbitration on the same footing as if they were legally responsible, like private com-

panies for wrongs done by their servants in the course of their employment. Thus in cases of collision or other torts the immunity of the British Government is largely theoretical. In practice it means that no ship belonging to the Government can be sued *in rem* or arrested, and that the only Court which can exercise jurisdiction is that to which the officer in charge of the State-owned ship is personally subject or to the jurisdiction of which the Government on his behalf consents, and that is usually a Court in England or Scotland. Dr. Matsunami, in his book, has not unnaturally dealt more fully with the theoretical immunity of the British Sovereign from legal proceedings, and the reader might fail to appreciate that owners of private ships, whether British or not, do possess effective remedies under British law for the recovery of compensation in cases of damage caused owing to collision or otherwise by British State-owned ships.

As regards ships which are owned by a foreign independent State the position is different. Dr. Matsunami, in his examination and criticism of English law, has not made the distinction clear between British and other State-owned ships. The British Courts, on the ground of international comity or courtesy, and on no other ground, decline to exercise jurisdiction against a foreign Sovereign or independent State, unless the Sovereign or State voluntarily submits to the jurisdiction. The immunity from British jurisdiction of a foreign Sovereign does not depend on the rule, which is applicable to the British Sovereign only, that the King can do no wrong, or on the prerogative rights of the British Sovereign to immunity from the jurisdiction of his own Courts except to the extent to which he has waived the prerogative by Statute, or on the rule that the principle of *respondeat superior*, which has no application to the British Sovereign, is not applicable to a foreign Sovereign. If a warship or any other ship belonging to a foreign Sovereign or State collides with a private-owned ship, whether British or not, the owner of the State-owned ship may sue in England the private-owned ship *in rem* or her owner *in personam* if he resides or carries on business in England. The owner of the private-owned ship may in such action counterclaim for his damage against the foreign Sovereign or State, and, if the State-owned ship is to blame for the collision, the private owner may recover judgment on the counterclaim. If the foreign Sovereign or State has obtained security for the claim by arresting the private-owned ship, the English Court may stay the action until the foreign Sovereign or State has given security for the counterclaim.[1] Thus the English Courts recognize the liability of a foreign Sovereign or State for the wrongs of its officers or servants, and will give judgment on a counterclaim against the State pronouncing in favour of such liability. But when a foreign State is not the claimant or plaintiff, but is the respondent or defendant, the Court will decline to exercise any jurisdiction against such State on being satisfied that the State is recognized by the British Government as an independent Sovereign State, unless the State consents to the jurisdiction.

[1] *The Newbattle* (1885) 10 P.D. 33.

The Court of Appeal in England has decided [1] that an action cannot be maintained in England against the United States Shipping Board as owner of an ordinary trading ship, unless the Board voluntarily submits to the jurisdiction, because the Board is an executive branch of the Government of the United States of America. But many actions have been tried in the English Courts against ships belonging to the United States Shipping Board in cases in which the Board have submitted to the jurisdiction. It is in cases in which the foreign State has not submitted or consented to the jurisdiction that the English Courts have declined to exercise jurisdiction. In such cases the Courts act on the rule [2] that it is a violation of the respect due to a foreign Sovereign or State to issue the process of the Courts against such Sovereign or State, either directly by proceedings *in personam* or indirectly by proceedings *in rem* against any property belonging to the Sovereign or State. Therefore it has been decided [3] that a foreign Sovereign could not be sued in an English Court for breach of a promise to marry made whilst he was residing in England and living as a private individual under an assumed name to conceal his identity. On the same principle the Court of Appeal recently held in the case of the *Jupiter* that the Court could not entertain, against the wish of the Union of Soviet Socialist Republics, an action brought under the following circumstances. A Russian merchant ship belonging to a Russian company at the time of the Revolution in Russia was afterwards laid up in an English port. The Company transferred its operations to Paris and paid the wages of the master and crew and the expenses of the ship. After the British Government recognized the Union as a Sovereign State, the master, who was a Russian, held possession of the ship for the Union, which claimed to be her owners under a decree made in Russia nationalizing Russian ships. The representatives in Paris of the Company issued a writ *in rem* in the Admiralty Court in England and served it on the ship. They claimed that they were entitled to possession of the ship. An appearance to the writ was entered on behalf of the Union under protest, and an application was made on their behalf to set aside the writ and all proceedings on the ground that the Union claimed to be the owners and objected to the Court exercising any jurisdiction over the ship. The Court granted the application. The Court declined to try the question in dispute whether the Union were the owners of the ship or whether the plaintiffs were in possession, because that would have involved impleading a foreign Sovereign State against its wish, and would therefore have offended against the rule of international comity. Two other recent decisions may be referred to as illustrating the length to which the English Courts have gone in applying that rule. A British ship

[1] In *Compañía Mercantil Argentina* v. *United States Shipping Board*, [1924] 18 Ll.L.R. 369.

[2] See per James L.J. in *Strousberg* v. *Republic of Costa Rica*, 29 W.R. 125.

[3] *Mighell* v. *Sultan of Johore*, [1894] 1 Q.B. 149.

was damaged by collision by a merchant ship which belonged at the time of the collision to the Belgian Government. The Belgian Government afterwards sold her to a private company, and, whilst the ship was in the ownership of the company, the owner of the British ship arrested her in England in an action for the recovery of the damage caused by her in the collision. It was contended that a maritime lien attached to the offending ship for the damage caused by her, and that the lien was enforceable by arrest after she had lost the immunity from arrest which she enjoyed so long as she belonged to the Belgian Government. The Court of Appeal [1] decided that the action could not be maintained, because it was not permissible to recognize a maritime lien as attaching to the property of a foreign Sovereign State. If the Court recognized the existence of such a lien the value of the ship to the State would be diminished, and to diminish her value to the State would be inconsistent with the rule of immunity from jurisdiction over the property of a foreign State. In a subsequent case [2] a merchant ship owned by a private owner but requisitioned by and in the possession of the Government of the United States and manned by a crew appointed and controlled by the Navy Department, caused damage by collision to a British ship. After the offending ship had been returned to her owners she was arrested in England at the suit of the owner of the British ship. It was held that the action could not be maintained, because no maritime lien could attach to a ship whilst she was in the temporary ownership of a foreign Sovereign State.

It is a possible view that the English Courts have carried the doctrine of international comity too far, and ought not to have extended it to cases of ships employed in commercial work. In 1873 Sir Robert Phillimore [3] expressed the opinion that a Sovereign may, by assuming the character of a trader, waive in respect of such trading the privilege which he enjoys generally as a Sovereign, and there is high authority in the American Courts to the same effect.

Dr. Matsunami, in his book, has rendered a useful public service in examining the reasons for and against the immunities of State-owned ships, and showing that, on grounds of justice and expediency, the immunities ought to be modified.

[1] *The Tervaete* [1922], P. 259.
[2] *The Sylvan Arrow*, [1923], P. 220.
[3] In *The Charkieh*, L.R. 4 A. & E. 59.

THE CONSTITUTIONAL CHANGES IN NORTHERN RHODESIA AND MATTERS INCIDENTAL TO THE TRANSITION.

[*Contributed by* G. D. Clough, Esq., O.B.E.]

In pursuance of the Agreement between the Secretary of State for the Colonies on behalf of His Majesty and the British South Africa Company of September 29, 1923, for the settlement of outstanding questions relating to Southern and Northern Rhodesia the administration of Northern Rhodesia by the British South Africa Company terminated as from April 1, 1924.

Northern Rhodesia, which still continues to be a Protectorate, is now governed by a Governor and Commander-in-Chief.

The Northern Rhodesia Order in Council, 1924, which came into force on April 1, 1924, and which is subsequently referred to in this article as " the Order in Council," repealed the Northern Rhodesia Order in Council, 1911, and various other Orders in Council amending or adding to the same, providing for the administration of the Territory, and provided that, in place of the Administrator, for whose appointment provision was made by the Northern Rhodesia Order in Council, 1911, there should be a Governor and Commander-in-Chief and transferred to him any power, jurisdiction or authority vested in the High Commissioner for South Africa or the Administrator of the Territory under any law then in force in the Territory. Sir Herbert James Stanley, K.C.M.G., has been appointed to be the first Governor and Commander-in-Chief.

The Order in Council provided that, for the purpose of advising the Governor, there should be an Executive Council consisting of such persons as His Majesty might direct, and the Royal Instructions of February 26, 1924, directed that the Executive Council should consist of the persons for the time being lawfully discharging the functions of Chief Secretary to the Government, of Attorney-General, of Treasurer, of Secretary for Native Affairs, and of Principal Medical Officer, who should be styled *ex-officio* Members of the Executive Council, and such other persons holding office in the public service of the Territory as the Governor, in pursuance of Instructions from His Majesty, might from time to time appoint, who should be styled Official Members of the Executive Council, and, further, of such persons (if any) not holding office in the public service of the Territory as the Governor, in pursuance of Instructions from His Majesty, might appoint, who should be styled Unofficial Members of the Executive Council.

The Instructions also provide that whenever, upon any special occasion, the Governor may desire to obtain the advice of any person within the Territory relating to affairs therein, he may summon for such special occasion any such person as an Extraordinary Member of the Executive Council.

The Order in Council also made provision for a Legislative Council constituted in such manner and consisting of the Governor and such persons as were directed by the Northern Rhodesia (Legislative Council) Order in Council, 1924, or by any Order in Council amending or substituted for the same or by any Instructions under His Majesty's Sign Manual and Signet or through a Secretary of State.

The Northern Rhodesia (Legislative Council) Order in Council, 1924, provided that the Legislative Council should consist of the Governor as President, five *ex-officio* Members, Nominated Official Members not exceeding four in number, and five Elected Unofficial Members consisting of such persons as might be elected in accordance with the provisions of any Ordinance as should be enacted for that purpose, and that, pending their election, there should be five Nominated Unofficial Members.

The persons appointed to be the *ex-officio* Members of the Legislative Council are the same as those appointed to be *ex-officio* Members of the Executive Council, and the Nominated Official Members of the Legislative Council are to be selected from persons holding office in the public service of the Territory.

Under the Administration of the Territory by the British South Africa Company, there was neither an Executive nor a Legislative Council, but there was an Advisory Council, which was consulted by the Administrator on all draft Proclamations affecting Europeans (other than Proclamations which the High Commissioner for South Africa considered to be urgent or involving matters of Imperial policy) and any representations made by this Council with respect to any Proclamation were submitted to the High Commissioner before a decision as to the issue of the Proclamation was reached. Details of administrative revenue and expenditure were also available to the Advisory Council.

No Ordinance has yet been passed making provision for the election of the Unofficial Members of the Legislative Council, and the Governor has nominated the persons who were members of the Advisory Council at the date of the change of Government to be the Nominated Unofficial Members of the Legislative Council.

Prior to the change in Government, justice was administered in accordance with the principles of and in conformity with the substance of the law for the time being in force in England, except so far as such law might be inapplicable or might be modified by law; in addition, no Act passed by the Parliament of the United Kingdom after August 17, 1911, was deemed to apply to the Territory.

Similar provision is made in the Order in Council, for English law

applying with similar exceptions to Northern Rhodesia, and the Order in Council provides that no Act passed by the Parliament of the United Kingdom after the commencement of the Northern Rhodesia Order in Council, 1911 (August 17, 1911), shall be deemed to apply to the Territory unless it has been or shall be applied thereto by any law for the time being in force in the Territory.

The Order in Council also provides for existing laws continuing in force in the Territory.

Under the Administration of the British South Africa Company, His Majesty's High Commissioner for South Africa, after consulting the Administrator, was empowered, subject to certain restrictions, to make, alter and repeal Proclamations for the administration of justice, the raising of revenue, and generally for the peace, order and good government of all persons within the Territory.

Subject to various restrictions the power to legislate is now vested by the Order in Council in the Legislative Council, which is authorized to establish such Ordinances as may be necessary for the administration of justice, the raising of revenue, and generally for the peace, order and good government of the Territory, but powers of legislation for the peace, order and good government of the Territory are reserved to His Majesty with the advice of His Privy Council.

With regard to Courts of Justice the Order in Council contains similar provisions to those comprised in the Northern Rhodesia Order in Council, 1911.

It provides for a Court of Record styled the High Court of Northern Rhodesia with full jurisdiction civil and criminal over all persons and over all matters within Northern Rhodesia subject to the provisions of the Order in Council with regard to native law and custom.

It also makes provision for Magistrates' Courts with such jurisdiction over all persons within the districts assigned to them as may be prescribed by any law for the time being in force in the Territory, and for Native Commissioners' Courts with such jurisdiction over natives or otherwise within the districts assigned to them as may be prescribed by any law for the time being in force in the Territory.

The Order in Council provides that in civil matters, when the amount or value in dispute exceeds £500 sterling, an appeal shall lie from the High Court to His Majesty in Council.

With regard to natives the Order in Council provides that all Ordinances passed by the Legislative Council shall respect any native law or custom by which the civil relations of any native chiefs, tribes or populations under His Majesty's protection are now regulated, except so far as the same may be incompatible with the due exercise of His Majesty's power and jurisdiction.

Any Bill, save in respect of the supply of arms, ammunition or liquor to natives, whereby natives may be subjected or made liable to any conditions, disabilities or restrictions to which persons of European descent

are not also subjected or made liable must be reserved by the Governor for the signification of His Majesty's pleasure, unless he shall have previously obtained His Majesty's Instructions upon the Bill, or the Bill contains a clause suspending the operation thereof until the signification of His Majesty's pleasure thereupon.

The Order in Council also makes provision for all rights reserved to or for the benefit of natives by certain concessions from Lewanika, the late Paramount Chief of the Barotse, to the British South Africa Company continuing to have full force and effect: provides for the acquisition of land by natives, and prohibits the removal of any native from any kraal or from any land assigned to him for occupation except after full inquiry by, and by order of, the Governor. The Order in Council lays down that in civil cases between natives the Courts of the Territory shall be guided by native law so far as that law is applicable and is not repugnant to natural justice or morality, or to any Order in Council, Law or Ordinance for the time being in force, and makes provision for the assistance of native assessors to advise the Court upon native law and customs.

With regard to civil servants, the Order in Council provides that all persons in the public service of the Territory at the commencement of the Order shall become public officers of the Territory and continue in full enjoyment of their existing rights.

With regard to land, minerals and railways the position is now as follows: as to land, the Agreement of September 29, 1923, provided that, as from the first of April, 1924, the full and entire control of the lands throughout the Territory should be taken over by the Crown and thereupon the Crown should be completely free to administer such lands in such manner as the Crown might in its discretion deem best in the interests of the native population and in the public interest generally, and that the Crown should pay to the British South Africa Company, as soon as possible after the close of each financial year, one half of the sums received by the Crown in each financial year up to April 1, 1965, from the sale or lease of land in North-Western Rhodesia (as it existed prior to the amalgamation of North-Western and North-Eastern Rhodesia in 1911) after making provision for the expenses of management and collection. The Agreement also declared that the British South Africa Company should be entitled to retain three freehold areas held by it in North-Eastern Rhodesia by virtue of certain concessions approved by the Certificate of Claim issued by Sir H. H. Johnston.

With regard to minerals the Agreement of September 29, 1923, provided that the Crown should recognize the British South Africa Company as the owner of the mineral rights acquired by the Company in virtue of certain concessions obtained from Lewanika in North-Western Rhodesia and certain concessions in North-Eastern Rhodesia covered by certain certificates of claim issued by Sir H. H. Johnston, but stipulated that the exercise by the Company of the aforesaid mineral rights should be subject

to the general laws and regulations obtaining from time to time in the Territory. The Agreement provided that in any instrument providing for the future government of Northern Rhodesia the Company's mineral rights should be granted a measure of protection no less effective than that granted to the Company's mineral rights in Southern Rhodesia by the Southern Rhodesia Constitution Letters Patent dated September 1, 1923. In pursuance of this arrangement the Order in Council provides that any Bill which alters or amends the arrangements relating to the collection and allocation of mining revenues in force at the commencement of the Order under any existing law of the Territory or otherwise, or any Bill imposing any special rate, tax, or duty on minerals within the Territory shall be reserved by the Governor for the signification of His Majesty's pleasure unless he shall previously have obtained His Majesty's Instructions upon the Bill or the Bill contains a clause suspending its operations until the signification of His Majesty's pleasure thereupon.

As regards railways, the Agreement of September 29, 1923, contained a recognition on the part of the Crown that the British South Africa Company was entitled to protection in view of the magnitude of the investment made by it in the railways constructed in Northern and Southern Rhodesia and of the very heavy burden of financial obligation assumed by it in guarantees which it has given to the debenture holders of the railway companies operating in Northern and Southern Rhodesia, and an undertaking that in any instrument providing for the future government of the Territory a measure of protection should be granted to the railway companies operating there no less effective than that given to the railway companies in the Southern Rhodesia Constitution Letters Patent above referred to. The Agreement also contained undertakings for the protection of the railway companies with reference to the construction of new railways, and as to the consideration to be accorded to schemes which the existing railways might submit for extending their present system in the Territory.

In pursuance of these undertakings the Order in Council provides that, unless he shall have previously obtained His Majesty's Instructions upon such Bill or the Bill contains a clause suspending its operation until the signification of His Majesty's pleasure, thereupon the Governor must reserve:

(*a*) Any Bill dealing with railways within the Territory until legislation shall have come into force in Northern Rhodesia adopting, so far as may be applicable, the provisions of the law in force in the United Kingdom relating to the Railway and Canal Commissioners and to the Rates Tribunal provided for by the Railways Act, 1921.

(*b*) Any Bill authorizing the construction of any new railways.

LAW CODIFICATION IN CHINA.

[*Contributed by* F. T. Cheng, Esq.]

Law Codification in China, it may be said, owes its origin to extra-territoriality. Foreigners in China are, no doubt, familiar with the privileges they enjoy under the name of extraterritoriality. There is no space here to deal with the system, but it may be remarked that its existence in China had a basis different from the system formerly existing in Turkey and other Mohammedan countries. The system in China was based purely on treaty concessions. The Treaty of Nanking, 1842, and the Treaty of Tientsin, 1858, with the British, and the Treaties of Tientsin, 1844 and 1858, with the United States are instances of treaties by which foreign Powers were conceded the privilege of extraterritoriality. At the beginning of the system the consequences of the concession were perhaps not fully apparent to the authorities, and still less to the people ; for there were only a handful of foreigners, and they were confined to the treaty ports. But the foreign population grew in size rapidly as the treaty ports were increased in number. The evils of the system gradually revealed themselves to the people as well as to the Government, and, consequently, a feeling of the necessity to abolish the system was awakened in the minds of the people. The opportunity came in 1902, when a revision of commercial treaties with foreign Powers took place. In that year with Great Britain, and in the succeeding year with the United States and Japan, a new treaty of commerce was concluded containing in each case a provision in these terms :

" China having expressed a strong desire to reform her judicial system and to bring it into accord with that of Western nations, . . . agrees to give every assistance to such reform, and she will also be prepared to relinquish her extraterritorial rights when she is satisfied that the state of the Chinese laws, the arrangement for their administration, and other considerations warrant her in so doing."

In order to fulfil that condition Shen Jar Pun, Vice-Minister of State and an eminent jurist in Chinese jurisprudence, and Dr. Wu Ting Fang, the well-known lawyer-diplomat, were, on the recommendation of Yuan Shih Kai and a few other progressive officials of similar standing, commissioned by the Emperor Kwang Hsu to revise the law and to bring it into accord with Western jurisprudence. But this project met with opposition, for there were powerful Ministers who thought that a radical change in the law amounting to the substitution of an entirely

new system for the old would give rise to misgivings among the people, and suggested a mere modification of the existing law as a means of preparing the minds of the people for the reception of a new code. In those days of conservatism counsels of moderation always gained adherents. As Dr. Wu was then still in the United States, his absence necessarily postponed the execution of the more ambitious scheme, and gave opportunity for the adoption of the latter course. Dr. Wu's new appointment, however, soon brought him back to China, and he at once began his new task. A general scheme of legal reform was drawn up, and Mr. Allen, an American lawyer, was engaged as adviser. In 1904 the Law Codification Commission was formally established. This gives us the date of the birth of an institution which is destined to open a new era in the history of Chinese jurisprudence, and, perhaps, become the most powerful agency in abolishing customs that are centuries old and in introducing new thoughts among the people in their civic and social conceptions. This commission has continued to exist, with the exception of a brief period in 1907, in one form or another, and is now in its full vigour. The present commission is composed of a president, two vice-presidents, two senior members, six junior members, and a number of investigators and advisers, foreign and native.

Having traced the origin of the Law Codification Commission, it may now be convenient to deal with law codification itself. Law codification in China, it may be pointed out, differs from law codification that might take place, for example, in a country like England. To understand this is to understand the nature of the work. Law codification in England would largely mean putting the existing law on a systematic basis. The Sale of Goods Act, 1893, the Bills of Exchange Act, 1882, the Partnership Act, 1890, Stephen's *Digests of Criminal Law and Evidence* and Jenks's *Digests* are instances of partial codification of English law. But codification in China means the introduction of an entirely new system. China, until late in the Manchu Dynasty, was governed by the Tsing Code, which, though largely penal in character, was in fact her *corpus juris*. It prescribed the conduct of officials, it regulated the revenue, it dealt with the family, it punished offences, and it provided for civil rights and liabilities. But, in spite of the high estimation given to it as an ancient code by its learned translator, Sir George Staunton,[1] it is obsolete for a modern society. Its criminal provisions had never been revised since the ample page of criminology was unrolled, while its civil provisions, except those relating to succession and marriage, largely dealt with concrete cases rather than laid down principles. It may perhaps occur to the reader to ask how it was possible that a country like China, with her 400,000,000 people, should have been governed by so

[1] "The most remarkable thing in this Code is its great reasonableness, clearness, and consistency. A calm, concise, and distinct series of enactments savouring throughout of practical judgment and European good sense." (Sir George Staunton's Preface to his translation).

little law. The answer is, the Chinese people are essentially a self-governing people—that is to say, their disputes were, and perhaps still are, settled among themselves more often than in a court of justice, and their conduct, at least in the past, was regulated by ethical principles rather than by law. In the old days an apt quotation from the sayings of Confucius or Mencius would prevail not only in the chapel or the guild, but even in a court of justice.

This was the state of law in China when her legal reformers began their task, and the consequence was, they had to introduce legislation wholesale. In their attempt to do this, one thing was inevitable—that is, they had to import much from foreign jurisprudence, for there are so many modern codes that can serve as models. Roughly speaking, the existing system of Chinese law is of the Continental type; but, on the whole, it has so far followed the Japanese and the German systems more than any other. The fact that the Japanese system has received preference perhaps needs an explanation. Sir Frederick Pollock once, in reviewing the work of a well-known writer, observed: "As regards the Continent of Europe, it is too meagre to be of any use. Japan, it seems, is the one bright exception in the author's eyes" (L.Q.R., 1916, p. 227). This is certainly not the reason that China had for choosing the Japanese system, nor does the reason consist in territorial propinquity. As a result of the Sino-Japanese War, and particularly of the Russo-Japanese War, the people in China began to realize the wonderful progress that had been made by modern Japan, and, particularly, the simple but significant fact of the progress which might be made by a nation within a comparatively short time. At that time a vigorous movement for reform was on foot, and, on account of the similarity in the two languages, which greatly facilitates study, hundreds of men of all ages who sought modern knowledge flocked yearly to Japan. Some studied political science, others medicine, engineering, or law, and, by the time when law reform was seriously entertained, there were already in the country many men who had received their training in Japan. Some, indeed, were already in office, while many others were ready to accept it, and so in the choice of the legal system to be introduced into China it was found that there were more men to recommend, as well as more men ready to apply, the Japanese system. Moreover, as the Japanese system is based very much on the Continental system, it must have been felt that the introduction of the Japanese system is merely importing Western jurisprudence indirectly—perhaps with this advantage, that the Western jurisprudence so imported would be a set of legal rules already tested in an oriental country. Moreover, the similarity of the two languages must have exercised a great influence on the minds of the early reformers who had to make their choice. Modern Japan has produced a mine of literature of Western jurisprudence which is immediately available to the Chinese magistrate, who may understand no other foreign language. If any other system had been followed, it would

have been found that much more work, and, consequently, a great deal of delay, would have been involved, and that an immediate adoption of a modern system of courts and law would have been less practicable.

Let us now return to the matter of legislation. The process was commenced in a negative manner—that is to say, the new legislation began by abolishing at once all laws that were obsolete or pernicious. In 1905 all cruel forms of punishment and torture as a means of obtaining evidence were formally abolished, and, in the following year, what may be called the Slave Act of China, forbidding in general terms the sale of persons, was promulgated, and in the revised code sanctioned by the Infant Emperor over two thousand provisions contained in the old code were abolished. In 1907 a real piece of positive legislation appeared. It was the passing of the Law of the Organization of the Judiciary, which, for the sake of brevity, may hereafter be called the Judicature Act of China. This Act, divided into fifteen chapters, consisting of 139 Articles in all, was the first attempt at putting the Courts on a systematic basis, by dividing them into four classes, viz. the Local Court, the District Court, the High Court, and the Supreme Court, with a judiciary of corresponding rank attached to each of them. The Local Court was abolished in 1914. Since then the District Court became the Court of first instance, the High Court the Court of first appeal, and the Supreme Court the Court of ultimate appeal. In a Court of first instance trial takes place generally before one judge, in a Court of first appeal before three judges, and in a Court of final appeal before five judges. The Local Court is now revived by the Codes of Procedure. By Article 16 of the Code of Criminal Procedure a number of offences such as those punishable with not more than one year's imprisonment or only with fine, those relating to opium, petty theft, public safety, false weight, gambling, and other similar petty offences are brought under the jurisdiction of the Local Court; and Articles 1 and 2 of the Code of Civil Procedure give the Local Court jurisdiction over cases such as those where the amount disputed or the value of the thing disputed does not exceed $800, those relating to possession, those concerning certain disputes between landlords and tenants, masters and servants, or customers and restaurant proprietors, and those relating to boundaries. At present, though the Local Court has been revived by the above-mentioned Codes, it is not yet actually in existence, and its jurisdiction is, pending its establishment, exercised by a Summary Division of the District Court.

The said Judicature Act provides not only for a system of Courts, but also for a number of other things, the most noteworthy of which are those concerning the qualification of judicial officers and the right of the Chief Justice of the Supreme Court to interpret the law. In Old China it had long been an accepted practice to regard the best essayist as necessarily the best judge and administrator, for in those days the only way to officialdom was through the classic examination, success in

which required only a knowledge of literature and philosophy, and nothing else, and all officials, whether judicial or administrative, were drawn from those successful in these examinations. The Judicature Act requires a person who aspires to the Bench to have the following qualifications:—

Article 106. No person shall be appointed a judge or procurator unless he has passed the two examinations mentioned in the *Judicial Examination and Appointment Regulations.*

Article 107. Any person who has studied three years or more in a school of law or political science and obtained a certificate of graduation may enter for the first examination.

Graduates of law of the Government University in Peking and graduates of law or political science of foreign universities or technical schools shall be considered to have passed the first examination, provided they have passed a special examination held by the Ministry of Education.

Article 108. Candidates successful in the first examination shall serve in a District (or lower) Court or Procuratorate for two years as probationers.

Article 111. Probationers shall, on the expiration of the period of probation, pass a second examination before they can become expectant judges or procurators of District Courts or Procuratorates.

Article 112. Any person who has obtained a certificate of graduation as provided in Article 107 and has, for not less than three years, been a teacher in a metropolitan or provincial school of law or political science or practised as a lawyer may become an expectant judge or procurator without passing an examination.

The above provisions have since been more or less modified, but their substance remains. The other provision conferring the power of interpretation on the Chief Justice of the Supreme Court is in some way unique. Students of Roman law will remember that imperial legislation in Rome was effected in three ways: (1) by *edicta, constitutiones*; (2) by *decreta*; and (3) by *epistolæ* or *rescripta.* The last consists in giving advice on questions of law in answer to inferior judges, and the power of interpretation conferred by the Judicature Act reminds one of this method of legislation of the Roman Emperor. Article 35 of the Act simply provides that the Chief Justice of the Supreme Court shall have the right to unify interpretation. In practice, doubtful or difficult questions of law, and sometimes the facts of a hypothetical case, are referred by the lower Courts to the Supreme Court for opinion, and the latter gives its reply by a letter, which reply, since the Supreme Court is the Court of ultimate appeal, is, as a matter of course, followed. Such practice is a matter of daily occurrence, inasmuch as the Civil Code has not yet been promulgated, and its absence necessarily leaves many questions unprovided for by legislation. It is in this way that a number of rules have grown up in the last ten years through the channel of interpretation, which rules, pending the promulgation of the civil code, are practically law. It may be doubted whether the framers of

Article 35 of the Judicature Act realized at the time that they were practically conferring on the Chief Justice of the Supreme Court the power of indirect legislation. If they had realized this, they would have probably limited the power in some respects, instead of providing it merely in general terms, particularly as the Act was framed in the days when the Emperor was the fountain of all laws. Most likely it was felt by the framers at the time that the Act was intended as merely a transitional legislative measure, to be superseded in the near future by more elaborate codes of substantive and adjective laws, and that the provision of Article 35 would then receive its proper attention. In 1919, when the Supreme Court Regulations were promulgated, the exercise of this power of interpretation was defined, the Articles concerned being as follows:

Article 202. The power accorded to the Supreme Court[1] by Article 35 of the Law of the Organization of the Judiciary to unify the interpretation of statutes and ordinances shall be exercised as follows:

(1) To explain and answer doubtful points.

(2) To rectify, in the interest of the State, any erroneous interpretation of statutes or ordinances that may have been rendered by any Public Office or Official mentioned in Article 204.

Article 203. Except as mentioned in the proviso of Article 35 of the Law of the Organization of the Judiciary, the interpretation of any statute or ordinance rendered by the Court in one case shall be binding in another of the same nature.

Article 204. Interpretation may be requested only by a Public Office or a legally recognized public juridical person or a Public Official in the course of duty, in respect of doubts arising from any statute or ordinance.

Article 206. The documents for interpretation shall be assigned by the Chief Justice of the Court to the Chief of a Civil or Criminal Division, according as they relate to civil or criminal matters for examination and interpretation.

The documents for interpretation and the interpretation rendered shall be perused by the Division Chiefs as well as the judges of all the Divisions, civil or criminal, as the case may be. If the interpretation rendered appears to any of the Division Chiefs or judges to be inconsistent with any decision or former interpretation of the Court, or to create a new principle, such Division Chief or judge shall express his opinion to that effect, and, if there are two or more opinions expressed, a conference of the judges of the Civil or Criminal Divisions, as the case may be, may be held at the instance of any of those who have expressed opinions.

The above Articles, except clause (2) of Article 202, which enlarges this power, merely embody the existing practice, so that, though the said Regulations were abolished in 1920, the substance of those Articles still remains. An undue space has perhaps been allotted to the Judicature Act in an article of this nature, but, since it is the first piece of legislation that revolutionizes our judicial system, an event which cannot fail to

[1] Article 35 of the Judicature Act in fact confers the power on the Chief Justice of the Supreme Court.

interest the judicial world, the end perhaps justifies the means in giving a fuller description of the Act.

Now let us resume the history of law codification. In 1906 a draft code relating to criminal and civil procedure consisting of 260 Articles was completed and submitted to the Emperor for approval, which, however, was not obtained, because a new draft was in the meantime prepared. In 1910 the Draft Criminal Code, the Draft Code of Civil Procedure, and the Draft Code of Criminal Procedure, and, in 1911, the Draft Civil Code, were completed. Of all these only the Criminal Code has since become law. It was promulgated at the commencement of the Republic as a mark of the new regime, and is now still in force under the name of Provisional Criminal Code. Since its adoption two revised drafts have been prepared, the last one being completed in 1919. Just as the Judicature Act has revolutionized the system of our Courts, the new Criminal Code revolutionizes our penal law. The old law, as embodied in the Tsing Code that has been replaced, though "for the repression of disorder and the general coercion of a vast population it is equally mild and efficacious" (Sir George Staunton's preface to his translation of the Code), was based on a conception alien to the views of modern criminologists. The old penal law was essentially objective—that is to say, it took into account the consequences of the offence more than the person of the offender. Consequently, it would punish every act that caused harm, and even allow the judge to inflict punishment for acts which were not expressly made punishable by law, but which in the opinion of the judge ought to be punished. The law now is no longer objective, but subjective. For instance, the Criminal Code expressly lays down that "no act constitutes an offence unless the same is specifically made so by law" (Article 10), and exempts from punishment offences committed by persons under the age of twelve or by lunatics (Articles 11, 12). Subjectivism is further emphasized in Article 13 of the Code, which provides that no intentional act constitutes an offence except where negligence is specifically made punishable, and that ignorance of law, though it does not render an act unintentional, may reduce liability according to the circumstances. The whole Code is, of course, in every sense a modern Code, whose framers have used for comparison the Hungarian Criminal Code of 1878, the German Criminal Code of 1871, the Dutch Criminal Code of 1881, the Italian Criminal Code of 1889, the Egyptian Criminal Code of 1904, the Siamese Criminal Code of 1908, and the Japanese Criminal Code of 1907. It is divided into two parts, consisting of 36 chapters and 401 Articles. Part I relates to general provisions, such as rules of application, general exceptions, attempt, recidivism, concurrences of offences, joint offences, punishments, etc.; Part II relates to specific offences. In this respect it follows the Codes of Germany, Hungary, Japan, the Netherlands and Siam. With regard to specific offences they are dealt with in a general way. The tripartite division of the French law (*crimes, délits, contraventions*),

which still exists in English law (felonies, misdemeanours, petty offences), but has been abandoned by most of the modern Codes, is not adopted. The new draft, which was prepared when Dr. Wang Chung Hui, who is now a judge of the International Court of Justice, was chairman of the Commission, but which still awaits enactment, is a work that may perhaps claim to have been produced after an inquiry into a wider field of modern criminology and to have profited by the genius of the latest criminologists; for, apart from the various Codes used in comparison in the preparation of the Provisional Criminal Code, the Austrian Draft Criminal Code of 1893, the Sudan Criminal Code of 1899, the Swiss Draft Criminal Code of 1918, the Preliminary Revised Draft of the German Criminal Code of 1909, the resolutions of the German Commission of 1914 on Criminal Law reform, and the counterdraft prepared by a number of German criminologists in 1911 have also been referred to in the preparation of the new draft. This, however, does not mean the introduction of radical changes in the existing Code. In many ways, indeed, scientific perfection has consciously been sacrificed to convenience and expediency. The existing Code has been in force for over a decade, and has worked satisfactorily. In view of this, radical changes, though theoretically plausible, would be inadvisable. The achievements of the new draft, if these may be claimed, chiefly lie in the introduction of more logical and scientific arrangement of the provisions and in the improvement of phraseology all round. Take, for example, Article 10 of the existing Code. Its provision is: "No act constitutes an offence unless the same is specifically made so by law," whereas Article 1 of the new draft, which replaces that provision, is worded as: "No act is an offence which is not expressly made punishable by the law in force at the time when it was done." An interesting comparison of the draft with the Indian Penal Code has been made by Mr. Sabonadière in this *Journal*,[1] and it has also been made the subject of a report and an exhaustive discussion at a meeting of the *Société Générale des Prisons* in April of the same year.

It now remains to deal with the Codes of Procedure and the Civil Code. As has been mentioned in an early part of this article, a Draft Code of Criminal Procedure and a Draft Code of Civil Procedure were completed in 1910. On the whole, they embody the leading principles of the Continental system. The Code of Criminal Procedure was reviewed by Professor Kenny in this *Journal*.[2] In his opinion: "The draftsmen of this proposed Code of Procedure have unquestionably done their work well and reflect credit upon whatever Western training they may severally have received, and the policy underlying many of their provisions, and the terse definiteness with which all their provisions are expressed, suggest that that training was oftener obtained in the Quartier Latin than in the Inns of Court." But neither of these Codes,

[1] See *Journal of Comparative Legislation*, Third Series, vol. iii, pt. 1, p. 69.
[2] *Ibid.*, vol. ii, pt. 3, p. 244.

with the exception of certain parts, was put in force. Since their completion new drafts have been prepared, which were promulgated in 1921 under the names of Regulations relating to Civil Procedure and Regulations relating to Criminal Procedure respectively. They are called Regulations merely because they have not yet been sanctioned by Parliament, but have been enforced merely by presidential mandates owing to the fact that Parliament had been dissolved at the time of their promulgation.

In English it will, of course, be more convenient to refer to them simply as the Codes of Procedure. The present Code of Criminal Procedure is divided into eight parts, consisting altogether of 514 Articles. Part I concerns general provisions, such as rules of application, jurisdiction, arrest and detention of accused, advocates, etc.; Part II concerns trial of first instance, which includes public prosecution and private prosecution; Part III concerns appeal which includes first and final appeals; Part IV concerns appeal against ruling; Part V concerns extraordinary appeal; Part VI concerns retrial; Part VII concerns costs; Part VIII concerns execution. It is considered to be a more up-to-date instrument than the one it has replaced. For instance, under the old draft, Preliminary Examination (*instruction criminelle*) was entrusted to the Procurator, whereas under the present Code it is restored to the judge, an alteration which is more in accordance with the existing practice in different nations having the system of *instruction criminelle*. Another feature of the existing Code is, greater protection is afforded to the accused. Article 62 of the Code expressly lays down that, in the execution of detention or arrest of the accused, consideration should be had for his person as well as his reputation, and Article 80 limits the time allowed for investigation and preliminary examination, and provides that the accused shall be released if the period of time allowed for investigation, or preliminary examination, as the case may be, has been exceeded contrary to the provisions of the Code. The latter provision gives effect to the words of Lord Bacon, who says, "Justice is sweetest when it is freshest," and may be compared to Article 126 of the German Penal Code of Procedure, Articles 325–327 of the Italian Penal Code of Procedure, and Article 190, clause 2, of the Austrian Penal Code of Procedure, as well as to the English Habeas Corpus Act, which provides that if a man who has been committed on a charge of treason or felony be not indicted at the next assizes after his commitment, he must be released on bail; and if at the next subsequent assizes he be not both indicted and tried he must be discharged altogether. Of course, there are other improvements, most of which are effected not so much as a result of scientific inquiry and study as a result of ten years' experiment of many of the provisions. The present Code of Civil Procedure is divided into six parts, consisting altogether of 755 Articles. Part I concerns general provisions, such as Courts, parties, proceedings in general; Part II concerns procedure in Courts of first

instance; Part III concerns procedure in appellate Courts; Part IV concerns appeals against rulings; Part V concerns new trials; Part VI concerns special proceedings. An enumeration of the matters dealt with under the title of Special Proceedings will reveal the highly Continental character of the Code. They are documentary actions, hortatory process, precautionary proceedings, proceedings by public summons, and actions concerning status, which is subdivided into actions concerning marriage, adoption, interdiction, quasi-interdiction, etc. Most of the provisions of the present Code, with minor changes, chiefly resulting from practical experience, were taken from the old draft. It is needless to say that, under the present system of procedure, such things as jurisdiction, order of debate, burden of proof, open trial, representation, etc., are expressly provided.

The existing draft of the Civil Code, which is destined to be replaced in the near future, follows largely the Japanese and the German Civil Codes. Unlike the Codes of Procedure, it has not been promulgated even in parts, but many of its provisions have in fact been adopted by the Courts under the name of principles of reason and equity or legal principles. Article 1 of the Draft Code provides: "Civil cases that are unprovided for in this Code shall be governed by custom, and, in the absence of custom, by the principles of reason and equity"—a provision that must have been introduced with reference to Article 4 of the Swiss Code, which directs the judge, in the absence of law and custom, to act as if he himself were the legislator. That very provision was adopted in the second year of the Republic by a decision of the Supreme Court (second year A.C. 64), and under the cover of this precedent many of the other provisions of the draft, and, indeed, a great deal of Western jurisprudence in general, have been adopted or introduced as principles, which, pending the promulgation of the Civil Code, are for all practical purposes law, and most of which will no doubt remain permanently part of the law of the land. The process of judicial legislation that has been taking place for the last ten years in this country, whatever may be the opinion of Bentham in regard to such legislation in general, has worked satisfactorily and will afford immense facilities for the reception of the future Civil Code in this country, for, as the Courts have by their decisions been daily making familiar to the people pieces of Western jurisprudence, they will, by the time the Civil Code will be completed, be so used to Western laws that the promulgation of the new Code will not be considered as springing upon them by surprise a strange system, but will be regarded as introducing to them in a coherent whole a system with which they are already familiar in parts.

THE REORGANIZATION OF THE ZANZIBAR COURTS.

[*Contributed by* S. S. Abrahams, Esq., *Attorney-General.*]

The statute book of the Zanzibar Protectorate has been enlarged in 1923 by the two most important enactments relevant to the administration of justice that have ever been passed in the history of the Protectorate.[1] By virtue of this legislation two separate jurisdictions, viz. that of His Britannic Majesty and that of His Highness the Sultan of Zanzibar, have been assimilated in respect of the form of the judicial establishment; the nomenclature of the Courts and their presiding officers; the powers of the Courts and the procedure regulating their criminal and civil functions; and the tribunals to which appeals from them may be preferred. In fine, instead of an amalgamation or fusion of these jurisdictions, long thought necessary, this assimilation has resulted in the creation of two parallel systems of Courts differing in one important incident only, namely, that of the nationality of the persons justiciable.

The jurisdiction enjoyed by His Britannic Majesty is derived from the Sultan of Zanzibar, though it is exercised in some circumstances over all persons within the limits of the Protectorate, whether subjects of the Sultan or not. This jurisdiction His Majesty enjoys by "treaty grant, usage, sufferance and other lawful means" within the dominions of His Highness the Sultan of Zanzibar.[2] This last sentence premises that the Sultan of Zanzibar is a sovereign prince, and he retains his sovereignty in respect of legislating for all persons who are still subject to his authority[3] and in respect of exercising forensic jurisdiction over such persons in his own Courts.[4] An extract from the judgment of the Privy Council in *The Secretary of State for Foreign Affairs* v. *Charlesworth, Pilling and Co.* ([1901] A.C. 373) is distinctly illuminating: "The root of the jurisdiction is the treaty grant or other matter by which the Queen has power and jurisdiction in Zanzibar. She thereby becomes an authority in the foreign territory of Zanzibar, though exercising her powers quite

[1] The Zanzibar Courts Decree No. 20 of 1923; the British Subordinate Courts Order, 1923, made by the Acting High Commissioner for Zanzibar under Article 22 of the Zanzibar Order in Council, 1914.

[2] Preamble to the Zanzibar Order in Council, 1914.

[3] This is done by Decree, as the statutory enactments of the Protectorate are designated, signed by the Sultan.

[4] "The Supreme Judicial authority is and remains vested in our Royal Person as part of the ancient sovereign prerogatives which we enjoy by inheritance from our predecessors on the Throne of Zanzibar" (Section 2, Zanzibar Courts Decree, 1908, substantially re-enacted by section 4, Zanzibar Courts Decree, 1923).

independently of the will of the Sultan. . . . But throughout the matter Zanzibar remains foreign territory, and the Queen and her officers are acting as Zanzibar authorities by virtue of the power which she has acquired and which is within its limits a sovereign power."

The jurisdiction exercised by Great Britain in Zanzibar was initially consular, and originated in the Treaty of 1839 with the Sultan of Muscut, whose dominions incorporated certain African possessions, including the territory which now comprises the present Zanzibar Protectorate. The African and Arabian dominions were separated in 1861. These exterritorial privileges were also granted by various treaties to France, Portugal, the United States of America, Italy, the Hanseatic Republics, Belgium, Germany, Austria and Russia, but the forensic jurisdiction once exercised by these foreign Powers had, by 1907, by arrangement from time to time with Great Britain, become vested in His Britannic Majesty's Court, now known and cited in local legislation as the British Court.[1] The Treaty of 1839 with Great Britain was replaced by the Treaty of 1886, and the jurisdiction conceded by the latter treaty was enlarged by a Declaration of the Sultan of December 16, 1892.[2]

The Treaty of 1886 was extinguished by the Treaty of November 4, 1908—a merely abrogative document. A fresh concession of jurisdiction from the Sultan to His Majesty was thus necessitated, and this was provided by the jurisdiction of the British Court Decree promulgated November 4, 1908. The preamble of this enactment and sections 1 to 3 inclusive and sections 5 and 8 are given *in extenso* below for the purpose of defining the limits and indicating the nature of the jurisdiction which His Majesty now exercises in Zanzibar and the immediate origin of this jurisdiction.

Whereas by the treaties negotiated with our predecessors several of the friendly Powers were entitled to rights of extra-territoriality, and had established Courts of Justice in our dominions ;

And whereas the jurisdiction of the British Court as now established can be extended to other foreigners in pursuance of a Decree issued by us ;

And whereas several of the friendly Powers have closed their Courts of Justice in our dominions upon the condition that their citizens or subjects should be amenable to the jurisdiction of the British Court ;

And whereas by a Decree of our predecessor Seyyid Ali bin Said, dated December 16, 1892, exclusive jurisdiction was granted to Her Britannic Majesty's Agent and Consul-General, or to a person or persons appointed by him, in all suits in which British subjects were plaintiffs or complainants, and our subjects or the subjects of other non-Christian Powers not represented by Consul at Zanzibar were defendants or accused ;

[1] " His Britannic Majesty's Court " was established by Article 7 of the Zanzibar Order in Council, 1897, upon the issue of which His Majesty's jurisdiction ceased to be consular.

[2] The text of all the above-mentioned Treaties and of the Declaration is to be found in Ball's *Zanzibar Treaties*, a privately printed volume from which no extracts are given here save those reproduced in publicly printed documents.

And whereas it is desirable to delegate this jurisdiction to the British Court and to extend it to all cases where foreigners are the plaintiffs or complainants, it is hereby decreed as follows:

1. The British Court shall have jurisdiction in Zanzibar and Pemba over the subjects of His Britannic Majesty, over the subjects and citizens of the friendly Powers whose Consular Tribunals have been, or shall be, closed, and over the subjects of all Christian Powers not represented by Consuls at Zanzibar.

2. The jurisdiction of the British Court shall also extend to all persons who are in the regular service of the subjects and citizens aforesaid.

3. All suits in which the subjects and citizens aforesaid are plaintiffs or complainants shall also be brought in the British Court.

5. The right heretofore possessed by His Britannic Majesty to pass Orders in Council for the good government of all persons within the jurisdiction of the British Court and upon all matters relating to the exercise of its functions shall continue in full force, and any such Orders in Council now in force shall be deemed to have been enacted in pursuance of the authority now granted.

8. In this Decree "the British Court" means the Court established by the Order in Council of His Britannic Majesty, called "The Zanzibar Order in Council, 1906," or any Order in Council amending or substituted for the same.

It is in dependence upon this grant and the other sources of jurisdiction ("treaty usage," etc.) that His Majesty has from time to time issued Orders in Council under which he exercises his jurisdiction in Zanzibar, and of these the Order issued in 1914 constitutes the present British Court and prescribes the law and procedure to be followed therein.

The year 1908 was very important from the point of view of both British and Zanzibar jurisdictions. The Court referred to in Section 8 of the above-mentioned Decree was established and by the Order in Council of 1906 comprised the same constitution and personnel of the Court incorporated in the Order in Council, 1914. By Art. 8 of the former Order (corresponding in terms to Art. 16 of the Order of 1914) His Britannic Majesty's Court was constituted, and there were prescribed for that Court "a Judge and as many Assistant Judges of the Court as may from time to time be prescribed, and a Magistrate."[1] By Art. 13 the Secretary of State was empowered to appoint Subordinate Courts and presiding officers for such Courts, with such jurisdiction as he might think fit.[2] In 1908 the magistrates of the British Court were exercising over all persons subject to the jurisdiction of that Court original criminal jurisdiction in every offence, subject only to confirmation by the judges, of sentences of a particular kind or extent. Appeal lay to the judges, who also exercised and continued exclusively to exercise until 1917 the civil juris-

[1] Article 2 of the Zanzibar (Amendment) Order in Council, 1908, provided for the appointment of additional magistrates.

[2] By Article 22 of the Order in Council, 1914, this authority was conferred upon the High Commissioner, to be exercised with the approval of the Secretary of State.

diction of the Court, except in Pemba, to which reference will be made later.

The first step towards uniformity (to employ a neutral expression) of the two jurisdictional systems was also taken in the afore-mentioned year by the complete reorganization of the Sultan's Court and the appointment of British Officers to execute the more important judicial and magisterial functions. This reorganization was effected by the Zanzibar Courts Decree (No. 8 of 1908), and with slight modifications, which do not merit any particular reference, persisted until the reconstitution of 1923. By that Decree the Sultan's original civil jurisdiction was exercised by:

(*a*) Courts presided over by Kathis,[1] or native judges with jurisdiction limited to an amount of five hundred rupees.

(*b*) The Court for Zanzibar and Pemba,[2] which consisted of the magistrate who also held the appointment of magistrate in the British Court, and had unlimited civil jurisdiction, though, when the subject matter in dispute exceeded one thousand rupees, the Court was enlarged by two Kathis who acted in an advisory capacity only. Appeals from the decrees of this Court for the Islands of Zanzibar and Pemba were heard by the Supreme Court presided over by a judge of the British Court, assisted by two Kathis as consultants only.

The Sultan's original criminal jurisdiction was exercised by:

(*a*) District Courts held by District Officers [3] and invested with powers to try any offence the maximum punishment of which did not exceed seven years, and to award a maximum sentence of six months' imprisonment and a maximum fine of two hundred rupees.

(*b*) The Court for Zanzibar and Pemba consisting of the magistrate sitting alone, and invested with powers to try any offence and pass any sentence authorized by law subject to certain conditions of confirmation.

Appeals from the District Courts in criminal matters were heard by the Court for Zanzibar and Pemba, and appeals from the latter Court were heard by the Supreme Court staffed as in civil matters.

From the foregoing observations it will be seen that, with the exception of the comparatively slender amount of business transacted by the District Courts, the whole of the original criminal jurisdiction of the Protectorate was vested in two magistrates, one of whom was stationed in Zanzibar and the other in Pemba.

The civil jurisdiction of the Zanzibar magistrate, though important in its extent, was very small in volume compared with that exercised by the judges of the British Court. For Pemba, however, where the litigation in the British Courts was mostly of a petty type, it was felt in 1910 that the whole of this business could be transacted by the magistrate,

[1] This is the accepted local spelling; the approximate phonetic spelling is Qadhi.

[2] The African dominions of the Sultan, which are now administered by the Zanzibar Government, consist of the contiguous islands of Zanzibar and Pemba.

[3] Criminal jurisdiction under this head was also conferred upon, but not exercised by, the Kathis.

and accordingly, by an order of the Secretary of State issued on June 30, 1910, pursuant to the Order in Council, 1906, a Magistrate's Court subordinate to the British Court was erected with unlimited powers, appeals from which lay to the British Court.

Although uniformity of the two jurisdictions had by 1910 proceeded to the length of placing the whole of the criminal business and by far the bulk of the civil business of the Protectorate in the hands of British officials, it became apparent before long that considerable reforms were necessary in the constitution and duties of both judiciaries.

It was clear that the judges of the British Court were compelled to transact too much civil business. However small the amount at stake, the suit had to be brought before a judge whenever plaintiff or defendant was subject to the Order in Council. *Per contra*, however large the amount, when both litigants were subject to the jurisdiction of the Sultan, the suit had to be brought before a magistrate. This was not only inconvenient, but created an undoubted grievance and an impression among subjects of the Sultan that foreigners received better justice than they. To illustrate by example, an Arab suing an Arab for an amount not exceeding five hundred rupees could get the opinion of the judge on the merits of his case only by way of the Kathi's Court and the Magistrate's Court —that is to say, by means of one original action and two appeals. If, however, the same Arab sued an Indian for five hundred rupees the case was of necessity brought before a judge. Moreover, a further inequality was felt in that appeals from the judge of the British Court lay to the Court of Appeal for Eastern Africa,[1] and even to the Privy Council. It was obvious also that, although no inequality of treatment existed on the criminal side, the magistrates were invested with a jurisdiction excessive in volume and extent. Whatever schemes, however, that might have been propounded for the removal of inequalities and the better distribution of business were shelved during the war, but in 1917 certain important legislative innovations were made, and these included a reorganization of the British Court. Twenty-one Indian Acts, which until then had been applied with local modifications to the British Court, and in a few instances to the Sultan's Court, and which constituted the whole of the adjective law and the most important substantive law of the Protectorate, were converted into decrees by Sir William Murison, the then Chief Judge of the British Court, thus becoming Zanzibar law in place of applied Indian law. *Pari passu* with this reform the High Commissioner, by Proclamation issued under Art. 22 of the Order in Council, provided for the establishment of Courts subordinate to the British Court. Those Courts were :

1. A Magistrate's Court for each of the islands of Zanzibar and Pemba, presided over by the magistrate of the British Court.

[1] Prior to 1914 appeals lay to the High Court of Bombay. By Articles 29 and 41 of the Zanzibar Order in Council, 1914, appeals were transferred to the Court of Appeal for Eastern Africa, of which the Zanzibar judges were and are constituent members. See now the Eastern Africa Court of Appeal Order in Council, 1921.

2. A District Commissioner's Court for Pemba, presided over by the District Commissioner of Pemba.

3. Various Assistant District Commissioners' Courts established according to the administrative division of the Protectorate, presided over by the appropriate Assistant District Commissioner.

The jurisdiction assigned to these Courts was at the outset limited to criminal matters.

The Magistrates' Courts were designated Subordinate Courts of the First Class, that of the District Commissioner a Subordinate Court of the Second Class and those of Assistant District Commissioners Subordinate Courts of the Third Class. Any of these Courts could try a native for any offence except homicide, but could try a non-native only if authorized to do so by the Schedule of Offences set out in the Criminal Procedure Decree, the enactment adopted from the Indian Code of Criminal Procedure under which the Courts worked.

Any person not so triable had to be committed for trial to the British Court, which was referred to in the above-named Decree as the High Court, and performed the functions of a High Court under the Indian Code. Incidentally by the Civil Procedure Decree similarly adopted from the Indian Code of Civil Procedure under which the British Court transacted its civil business, " His Britannic Majesty's Court is deemed to be the High Court."

This reorganization of the British Court and redistribution of criminal work had comparatively little practical effect except as an indication of the lines upon which complete reform of the entire judiciary ought to proceed. The magistrates were relieved of a rather meagre amount of work which the District Officers were enabled to perform, but, as homicide is rare in the Protectorate among all classes and as little serious crime is committed by non-Africans, there were very few cases committed to Sessions. The inequality of treatment of the Sultan's subjects was, however, further emphasized by the distinction between the justiciability of natives and that of non-natives. Now, as the legal definition of " native " included Arabs, all Subordinate Courts under the new system were enabled to try an Arab of whatever degree in life for any offence less than homicide, which made him justiciable in the British Court ; moreover, in the Sultan's Court he was still triable by the magistrate for any offence whatever. On the other hand, an Indian could only be triable by the Subordinate Courts in respect of certain scheduled offences, and the distinction, though probably not in the circumstances raising any genuine resentment, was nevertheless invidious as plausibly suggesting a false valuation. With the termination of the war, however, more and more attention was enabled to be directed towards judicial reform, and in 1921, owing to the realization that a heavy burden of civil work was placed upon the magistrate in the British Court in Pemba, the High Commissioner issued a further Order under the Order in Council, 1914, erecting further Courts in Pemba subordinate to the British Court. Those Courts were : A

Court of the District Commissioner to be called a "First Class Subordinate Court," with jurisdiction in suits the value of which did not exceed a thousand rupees ; Courts of Assistant District Commissioners, to be called "Second Class Subordinate Courts," with a limit in jurisdiction of five hundred rupees ; Kathis' Courts, with jurisdiction over natives only, and limited to five hundred rupees. Appeals from these Courts lay (and with finality) to the High Court.

The time had now become ripe for a consideration of the entire question of proper distribution of business among the judicial officers and the establishment in some way of equality of jurisdiction in the two existing systems. Amalgamation of the systems, which had long been mooted, was beset with certain difficulties, and it was thought better to attain uniformity by some other means which would at the same time preserve the dual jurisdiction.

The problem was solved by Mr. T. S. Tomlinson, the present Chief Judge, who dealt with the complicated conditions prevailing in a very simple manner and presented a scheme which had not been previously submitted. Mr. Tomlinson was responsible also for the enactments which gave the scheme its legislative shape. The uniformity of jurisdiction which had been the desideratum for so long was attained, not by amalgamation but by assimilation, and at the same time the redistribution of business was effected. A fresh Order by the High Commissioner (The British Subordinates Courts Order, 1923) was issued. By this Order, which came into operation on July 29, 1923, His Britannic Majesty's Court is called the British Court, and the following Courts subordinate to it are established :

(*a*) Courts of Resident Magistrates, or District Commissioners, called "First Class Subordinate Courts."

(*b*) Courts of Assistant District Commissioners, called "Second Class Subordinate Courts."

(*c*) Courts of Assistant District Commissioners, called "Third Class Subordinate Courts."

(*d*) Kathis' Courts.

Criminal jurisdiction is vested in the first three named, and the limits of each are assigned to it by Schedule 2 of the Criminal Procedure Decree. The invidious distinction in justiciability between natives and non-natives is thus removed.

In civil matters the jurisdiction of each Subordinate Court is limited. Powers of appeal (in civil cases limited to suits involving a value of more than two hundred and fifty rupees) continue to lie to the British Court from all Courts subordinate to it.

The reconstitution of the Sultan's Courts was effected by the Zanzibar Courts Decree, 1923, which established a system of Courts parallel to those created to exercise His Majesty's jurisdiction. By this enactment a Court is created styled His Highness the Sultan's Court for Zanzibar, with a shorter designation of "The Zanzibar Court." This Court now consists of the Judges of the British Court, "is deemed to be the High Court," and

corresponds functionally both in original and civil matters to the British Court. A number of Courts subordinate to the Zanzibar Court are also established corresponding in designation and extent of jurisdiction to those subordinate to the British Court, and presided over by the same officers. To complete this assimilation appeals from the Zanzibar Court are allowed by the above-mentioned enactment to the Court of Appeal for Eastern Africa and thence to the Privy Council, the necessary corresponding powers being conferred on these respective tribunals by the Eastern African Court of Appeal Order in Council, 1923, and the Eastern African (Appeal to Privy Council) Order in Council, 1923.

It remains to be observed that any of the Courts established under the Decree may call in the aid of a Kathi to assist it in advising on questions of Islamic law, with which these functionaries are peculiarly fitted by training and local experience to deal.

THE DECISIONS OF THE ANGLO-GERMAN MIXED ARBITRAL TRIBUNAL.—II.[1]

[*Contributed by* EVERARD DICKSON, ESQ.]

As a matter of history it is to be recorded that, as is provided for in Article 304 (*c*) a second division of the Tribunal has been constituted. The President of this division, which sat for the first time on November 6, 1923, is Baron D. W. van Heeckeren, a distinguished Dutch jurist. The British member is Mr. Heber Hart, K.C.,[2] and the German member Excellenz Dr. Hermann Johannes, who has also sat for a short time with the first division.

The second division of the Tribunal, which has dealt with many cases, does not, as a rule, deliver a reasoned decision. The first division, on the other hand, adheres to its practice of delivering in every case a reasoned decision. Unless, therefore, especially noted, the decisions recorded in the following paper are those of the first division.[3]

Jurisdiction.—As to the extent of the field of their jurisdiction, the Tribunal have upheld in Claims 78 and 79 *Gramophone Co. Ltd.* v. *German Government and others*, the opinion expressed in *Norddeutsche Bank* v. *Board of Trade and the Public Trustee*, vol. ii, *Recueil* 520. The Tribunal have jurisdiction to deal with questions governed by the provisions of the Treaty in which the Mixed Arbitral Tribunal is expressly mentioned, and with questions covered by such further provisions as relate directly or give rise to questions related directly to those so establishing their jurisdiction.

DEBTS.

The Tribunal have, in the eighteen months under review, dealt with many questions relating to debts. It will be remembered that the Treaty of Versailles makes provision for the settlement through Clearing Offices of four classes of pecuniary obligation, of which the more important are debts payable before the war, and due by a national of one of the signatory Powers, residing within its territory to a national of an opposing Power residing within its territory (Article 296, I), and debts between such nationals, which became payable during the war,

[1] See the *Journal of Comparative Legislation*, Third Series, vol. v, p. 17.

[2] The President and the British member also sit, in the same capacities, on the Anglo-Austrian, Anglo-Bulgarian, and Anglo-Hungarian Mixed Arbitral Tribunals.

[3] For purposes of convenience, the decisions of the second division will be marked with an asterisk.

and arose out of a contract or transaction of which the total or partial execution was suspended on account of the declaration of war (Article 296, 2).

Nationality and Residence.—The Tribunal have decided that Egyptians are to be considered as British nationals for the purpose of carrying out the provisions of Section III and Section IV of Part X of the Treaty (Claim 631, *National Bank of Egypt* v. *German Government and Another*†). The holder of a certificate to that effect from the Berlin police was held to be a German national (Case 640, *Jay* v. *Kunick*†). The German Government is not liable for debts contracted by officials of the Kamerun Protectorate. Applying the provisions of Article 121, the Tribunal arrived at the conclusion that the debts of the Protectorate do not fall within the scope of the Clearing procedure (vol. iii, *Recueil* 232).

A British company in liquidation under Section 2 of the Trading with the Enemy (Amendment) Act, 1914, on account of German participation in its capital, is nevertheless entitled to recover a debt under the provisions of Article 296 (*Case* 1537, *International Anthracite and Steam Coal Association* v. *Hedwigshütte Kohlenwerke.*†

In dealing with debts due to partnerships of which the members are of different nationalities, and of which any of the partners were either nationals of an opposing Power, or neutrals, the portion of the debt to be settled through the Clearing procedure is ascertained by reference to the proportion which the partner or partners entitled to notify a debt to the Creditor Clearing Office would have taken of the assets of the firm if it had been wound up on August 4, 1914 (*In re Hardt & Co.* v. *Stern*, vol. iii, *Recueil* 12). The same principle applies conversely when the debt is claimed from a mixed partnership (*Fisher & Co.* v. *Biehn*, vol. iii, *Recueil* 19). So a British firm failed to recover through the Clearing Offices a debt due from a partnership firm of which one partner was an Argentine, and the other, a German national, was not resident in Germany on January 10, 1920 (Case 1733, *Kolp Coleman & Co.* v. *Plaut & Co.*†).

British trustees under a settlement of which the settlor was a British national, and the *cestuis qui trustent* were German nationals, recovered through the Clearing Offices war accumulations of income from Prussian Consols, which had been collected by a German bank on behalf of the Trustees (*Eckstein and Another* v. *Deutsche Bank*, vol. iii, *Recueil* 758). The first division of the Tribunal, in their decision, made a clear distinction between a case arising under the provisions of Article 296, and the position of British executors of the will of a deceased British national making a claim for compensation under the provisions of Article 297 (*e*) when the beneficiaries, or some of them, are not British subjects.[1] The second division of the Tribunal arrived at the same conclusion in a case under Article 296, and held that the British executors of the will of a deceased British national, under which there were several beneficiaries

† Unreported.

[1] See *Executors of Lederer deceased* v. *German Government*, *infra*, p. 312.

of American nationality, and others of German nationality, were entitled to recover the whole of a debt due by a German national to the testator (*Executors of Klingenstein deceased* v. *Karl Maier**).[1] From *obiter dicta* in this decision, it would appear that the second division were not prepared to make a distinction between the provisions of Articles 296 and 297 in this respect.

From a communication made by the Tribunal to the parties in Cases 299 and 358, *Jewish Colonization Association* v. *Deutsche Bank and Another*, it would appear that, for the purposes of the application of Article 296, the Treaty contemplates only one place of residence, and that it is not open to a party to set up the existence of more than one place of residence on the critical date (January 10, 1920). It is a fair deduction, from the same communication, that in the case of a legal entity such residence is not at the place of incorporation, but at the place where the business of the corporation is effectively conducted.[2]

In the case of prisoners of war and people detained, otherwise than as criminals, their place of residence, for the purposes of Article 296, is not regarded as that in which they actually were on January 10, 1920, but the place in which they took up their residence on release (*In re Otto Cloos* v. *Chota Nagpur Co-operative Credit Society*, vol. iv, *Recueil* 13).

The test of nationality is to be applied not only on January 10, 1920, but also :

(*a*) For pre-war debts, on the date of the outbreak of war between the two Powers whose nationality is claimed ;

(*b*) For debts payable during the war, on the date on which they became payable (Case 1534 *Rehder* v. *Landgesellschaft Wansee* †).

Debts Payable before the War.—Cases as to debts payable before the war, except in so far as they concern the nationality or residence of the parties, or the state of solvency or insolvency of the debtor, do not usually involve the same difficulties of construction of the Treaty as do questions as to debts which became payable during the war. Cases as to pre-war debts usually call primarily for the solution of questions of municipal law, private international law, or of fact.

In *Findlay* v. *Graaf*, vol. iv, *Recueil* 73, in answer to the debtor's contention that a pre-war debt was barred by prescription it was contended, on behalf of the creditor, that the Treaty provided no periods of prescription, and that the municipal laws of prescription of England, Scotland or Germany, being of the nature of *leges fori*, could not be relied upon in an international tribunal. The Tribunal, however, applied the law of the debtor—*i.e.* German law, under which the question of prescription

[1] Vol. iv, 6. The decision was signed by the German member of the Tribunal as a dissentient. This and another decision, in which the facts were similar, are the only instances of such an expression by a member of the Tribunal of his disagreement with the decision of the majority. See, however, *Burns Philip* v. *Norddeutsche Lloyd*, just decided.

[2] In this case the Tribunal, in the exercise of their arbitral functions refrained from delivering a decision, but called the parties together and made a formal communication to them, with the result that a settlement was effected.

is governed by the *lex loci contractus*, in this case Scottish law, under which the debt was barred. In *le Marchant* v. *von Lowenclou*, vol. iv, *Recueil* 17, it was held that the claim of a British creditor who had obtained a judgment in the King's Bench Division, which had remained unsatisfied, was not subject to the shorter period of prescription under German law, which would have been applicable to the transaction originally giving rise to the debt. The debt sued upon before the Tribunal arose out of the judgment.

Stockbrokers who closed a client's account without reasonable notice have been held not entitled to be indemnified for the consequent loss (Case 399, *Baron and Salaman* v. *Weinhagen* †). So, too, stockbrokers were held to have failed to establish that they had incurred any liability on behalf of their clients in a pre-war transaction on the London Stock Exchange (Case 735, *Baron and Salaman* v. *Kollisch* †).

The Tribunal are frequently called upon to decide whether the property in goods bargained and sold before the outbreak of the war had passed from the vendor to the purchaser (*e.g.* Case 1623, *Koch* v. *Little*,† Case 446, *Makin* v. *Pfeiffer*,† *Gumprecht & Co.* v. *Gibbs & Sons*, vol. iii, *Recueil* 779). *In re Rhymney Iron Co. Ltd.* v. *Vinnen*, vol. iii, *Recueil* 785, the Tribunal, by consent of the parties, applied the law of the flag, in this case German law, to a claim against a shipowner in respect of liabilities incurred prior to the war by the master of a German ship, which had been captured by a British warship, and condemned in prize. It was held that there were no circumstances present which would make the shipowner personally liable, and that his liability with the ship and freight terminated on the condemnation in prize.

Debts Payable during the War.—In order to be subject to settlement through the Clearing Offices debts payable during the war must arise out of " . . . . transactions or contracts . . . . of which the total or partial execution was suspended on account of the declaration of war."

In *Bolandmoore* v. *Eltzbacher and Another*, vol. ii, *Recueil* 886, the Tribunal upheld their previous decision, *Benvenisti* v. *Furstenburg*, vol. ii, *Recueil* 190, excluding legacies from the operation of Article 296. In this case it was held that annuities which had been bequeathed by a German testator and which fell due to the creditor during the war did not fall within the scope of the Clearing procedure, for their payment was an obligation imposed on the heirs by the will, which under German law is a one-sided act, and so not " a transaction or contract."

In Case 1673 *Whitwell* v. *Brandenburgische Berufsgenossenschaft*,† it was held that the amount of a benefit due under the German Imperial Insurance Act from a statutory association to the creditor, who was compulsorily insured, did not arise out of " a transaction or contract." In Case 1914, *Ficke* v. *Scottish Widows Fund*,* the widow of Carl Ficke, a German national, who suffered death under the sentence of a French Court Martial sitting at Casablanca, recovered the amount reserved on a policy of life insurance taken out by her late husband. On the other

hand, the surrender value of a life insurance policy asked for from the insurance company in accordance with the terms of the policy in May 1920, *i.e.* after the Treaty had come into force, was held not to fall within the scope of the Clearing provisions (Case 522, *Lewis* v. *Germania* †). The same principle was applied in a case in which the policy had lapsed through breach of its conditions, and advantage was taken of the provisions of paragraph 2 of the Annex to Section V, Part X, of the Treaty (*Ehrhardt* v. *Badische Anilin*, vol. iii, *Recueil* 518).

The second division have allowed a claim for dividends in respect of the years 1913 to 1918, on the ground that right to receive a dividend was not created by its declaration, but it was a right already in the shareholder (*Duncan* v. *Duncan's Leinen A. G.**, vol. iii, *Recueil* 770). Applying the provisions of paragraph 7 of the Annex to Section V, Part X of the Treaty, the second division have held that the obligation to indemnify an accepting house in respect of acceptance for which cover had not been provided at the outbreak of the war applies to the whole of the debt incurred, and not merely to such part of it as relates to the period prior to January 10, 1920 (*Huth* v. *Beyer*, vol. iv, *Recueil* 2). Calls made during the war in respect of shares have been held recoverable under Article 296 (2), (Case 1545, *Champong Rubber Co. Ltd.* v. *von Tuercke* *†).

In Cases 614 and 615 *Rothschild* v. *Disconto Gesellschaft and Bleichröder* the creditors, at the joint request of the debtors, opened in 1897 a credit in favour of a Rumanian bank. The debtors guaranteed the creditors, up to the full amount of the credit, against bills drawn by the Rumanian bank, and accepted by the creditors. On December 31, 1914, a considerable sum was due to the creditors by the Rumanian bank in respect of bills for which they should have provided cover on maturity. On January 6, 1915, a moratorium was decreed in Rumania. The amount owing on the bills was recovered from the two German guarantors under Article 296 (2). The Tribunal held that the obligation of the Rumanian bank arose under English law, and that the Rumanian decree was not an answer to the claim against the guarantors.

By virtue of the provisions of Section 2 (1) of the Trading with the Enemy (Amendment) Act, 1914, dividends payable during the war on bearer shares in a British company, held by a German national, became payable to the British Custodian. As a result, the German national is not entitled to recover them under the provisions of Article 296 (2). (*In re Siemens'sche and the Indo-European Telegraph Co., Ltd.*, vol. ii, *Recueil* 882).

The proceeds of the sale during the war of goods belonging to a British creditor, and in the hands of his agent in Germany, have been recovered in more than one case (see, e.g., *Wenner* v. *Engelhardt*,* vol. iii, *Recueil* 760). A German banker held for a British customer municipal bonds which were redeemable in 1916. Acting in the best faith, in the absence of instructions, in 1916 he exchanged the bonds

for others issued by the same municipality redeemable in 1921. The British customer was, however, held not to be bound by the acceptance of the 1921 bonds, and the banker held liable for the amount at which the bonds were redeemable in 1916 (*Lautaro Nitrate Co.* v. *Behrens*, vol. iv, *Recueil* 37).

An instalment, paid during the war on behalf of an enemy purchaser of bonds by his agent in the transaction is recoverable under the provisions of Article 296 (2) (Case 766, *Cuthbertson Hood & Co.* v. *Calmann* †; Case 2065, *Berliner Bank Institut* v. *Koop & Overweg* †).

The position of a British subject who during the war continued to render services in accordance with a pre-war contract of employment is that of *negotiorum gestor*, and as such he is entitled to reasonable remuneration. The measure of such remuneration is not, however, the amount he received prior to the war before the dissolution of the contract (Case 601, *Ellert* v. *Dresdner Bank* †; Case 482, *Browne Geveke* v. *Norddeutsche Kartoffel Fabrik* †).

Continuation transactions on the London Stock Exchange have given rise to many cases before the Tribunal. The position of the broker with transactions pending for an enemy client when the " iron curtain of the war " fell, was one of great difficulty. The Tribunal had already recognized that so long as the broker acted reasonably he was entitled to recover contango charges, instead of simple interest at the Treaty rate of exchange (*Stamm & Co.* v. *Klettwig & Riebsten*, vol. iii, *Recueil* 8). In a case in which the brokers themselves, after the outbreak of the war, borrowed the funds from bankers and took up shares for which the enemy client had not provided the purchase price, they have been held entitled to recover, not only justified disbursements and commission prior to taking up, but also the purchase price and interest actually paid by them. In cases in which the shares were sold prior to January 10, 1920, the proceeds are set off, but in cases in which the shares remained unsold the value of the shares at the average stock exchange price of the last account day prior to January 10, 1920, is to be set off (*Crews* v. *Vortisch Oertle*, vol. iv, *Recueil* 59). The second division, whilst allowing brokers to recover disbursements in respect of stock which was, on the outbreak of war, being continued with jobbers or with a bank, and in respect of which they were under a liability as agents of an enemy client, disallowed the claim as to stock " taken in " by the brokers themselves, and in respect of which they were under no liability to any third party (Case 1420, *Koch* v. *Kleeman* *).

Suspension.—In order that a debt becoming payable during the war may fall within the provisions of Article 296, the execution of the contract or transactions out of which it arises must be suspended wholly or in part on account of the declaration of war. In *Anglo-South American Bank* v. *Mengers*, vol. iii, *Recueil* 220, it was held by the first division of the Tribunal that the Hamburg branch of a British bank became, on the outbreak of the war, under English law an enemy. The Tribunal, there-

fore, held that transactions between the branch and German nationals, which at no time involved the intervention of the Head Office in England, were but transactions between enemies from the standpoint of English law, and unimpeachable under German law, and in consequence were not suspended on account of the declaration of the war. As a result, the sums claimed as arising out of these transactions were held not to fall within Article 296. It should be added that credit was claimed by the German debtors for payments made by them in marks in January 1920. With facts before them which appear similar to those in the above case, the second division, in Case 1530, *Anglo-South American Bank* v. *Gebrüder Marx* * † allowed a claim of the same creditors, holding that the payments, in respect of which the debtors claimed credit, were made at times, and under circumstances, which excluded them from the scope of the Clearing procedure. The second division did not, however, deal expressly with the question of suspension.

The Tribunal have held that the effect of paragraphs 2, 3, and 4 of the Imperial Decree of September 30, 1914, and subsequent German enactments was to maintain, in favour of a German debtor, in the cases to which the decree applies, relief from the obligation to pay his debt, whilst, on the other hand, voluntary payment was not prohibited, so constituting a partial suspension, which enabled the debt to be recovered under the provisions of Article 296 (Case 931, *Standard Bank of South Africa* v. *Rascher* †).

Whatever the right opinion as to whether the legal effect of this decree was to suspend the execution of transactions between a German national and the German agent of a British national, holding a power of attorney, if the execution of the transaction was in fact suspended as a result of the decree, Article 296 (2) applies (*Reader* v. *Boehme*, vol. iv, *Recueil* 48).

In many of these cases the Tribunal have had to apply Article 299 (*a*) under which any contract concluded between enemies is regarded as having been dissolved as from the time when any two of the parties became enemies, "except in respect of any debt or other pecuniary obligation arising out of any act done or money paid thereunder, etc."

The Tribunal have held that on the dissolution of a contract under Article 299 (*a*) the amount due is to be ascertained according to the principles of equity (Case 76, *Spencer* v. *Schlotterhose* †). The holder of tickets for performances of Wagner's operas at the Bayreuth Festival in 1914, which were abandoned on the outbreak of the war, did not recover the full amount he paid, for a deduction in respect of the promoters' expenses was made, in accordance with the principles of German law, in order to arrive at the amount by which the promoters were enriched. The amount of the promoters' enrichment in respect of his tickets was recovered by the British creditor (Case 387, *Holme* v. *Bayreuth Festival* †). The onus is upon the debtor to show that the amount claimed by the creditor should be reduced in order to comply with these principles (Case 639, *Gerhardi* v. *Wolf* †).

With regard to third parties, a power of attorney is not dissolved, and payments to the holder of a power of attorney were effective to discharge a debtor (Case 578, *Irving* v. *Abraham* †).

Bankruptcy or Insolvency.—In applying Article 296 (6), under which the High Contracting Parties are relieved of responsibility for the payment of the clearing debts of such of their nationals as were before the war in a state of bankruptcy or failure or of such as had given formal indication of insolvency, the Tribunal have held that the proper date for the application of the test is August 4, 1914, and not August 1, 1914 (*Johnson Bros.* v. *Joachimson*, vol. iii, *Recueil* 223). In the same case the Tribunal held a circular letter written from the office of the debtor firm on August 3, 1914, stating that the firm had been compelled to suspend payment, to be a formal indication of insolvency. In consequence the Government guarantee did not apply, although having regard to the provisions of Paragraph 4 of the Annex to Section III, Part X, both the guarantee and the Clearing Office system were held to apply to the dividends falling due and payable during the war. (*Johnson Bros.* v. *Joachimson*, vol. iv, *Recueil* 69; *Reader* v. *Boehme*, vol. iv, *Recueil* 48).

Bankruptcy proceedings in Germany after the outbreak of the war resulting in legally binding compulsory arrangement cannot have the effect of reducing to the amount of the dividend a clearing claim in respect of a pre-war debt (*Atwood Beaver* v. *Kreitz*, * vol. iv, *Recueil* 65).

Rate of Exchange.—The above (*Johnson Bros.* v. *Joachimson* and *Reader* v. *Boehme*) are also authority for stating that the rate of exchange provided by the Treaty applies to dividends declared in the bankruptcy during the war.

The Tribunal have been at pains to exclude the possibility of a double benefit accruing to creditors by reason of the provisions of Article 296 (*d*). Such cases were exemplified in *Nathan and Roselli* v. *Oppenheim*, vol. iii, *Recueil* 227. The British creditors and the German debtors were engaging in an arbitrage transaction on the London Stock Exchange and the Berlin Bourse in Canadian Pacific shares when the war broke out. At the London end the creditors had sold, and at the Berlin end the debtors had bought. Owing to the outbreak of the war the debtors did not deliver to the creditors the stock to enable the transaction to be completed. There was in consequence a loss at the London end, but in Berlin when the shares were sold in 1919 they realized a price in marks which represented a vast nominal profit on the mark price for which they had been purchased, and which was due almost entirely to the depreciation of the mark. The creditors claimed this at the pre-war rate of exchange, but the Tribunal adopted the fiction of ascertaining the amount of the debt in £ sterling, at the rate of exchange of the day of the sale in Berlin.

In the case of a debt arising from the collection of a sum in a currency other than sterling or marks the view of the Tribunal appears to be that in the application of Article 296 (*d*) the pre-war rate of exchange between sterling and that currency is to be applied to the sum collected, and that

conversions effected by the debtor in his books are to be disregarded (Claim 959, *Coit* v. *German Government* †). This case arose under the provisions of Article 297 (*h*), but may conveniently be mentioned at this point, for, as is said in the decision, "with regard to currency and conversion into sterling, cash assets are by the Treaty placed within the operation of exactly the same rules as the debts referred to in Article 296 paragraphs 1 and 2."

Interest.—It will be remembered that as to the rate of interest the Treaty provides (Paragraph 22 of the Annex to Section III, Part X) that this shall be 5 per cent. per annum, "except where by contract, law, or custom the creditor is entitled to payment of interest at a different rate."

The Treaty rate of 5 per cent. is allowed when under a pre-war contract interest was not payable (*Jacob Walter & Co.* v. *Norddeutsche Bank*, vol. iii, *Recueil* 34). The Treaty rate is also applied to a case in which a lower rate was payable under a contract which expired on August 4, 1914 (Case 633, *Central Mining Corporation* v. *Darmstadter Bank* †).

The fact that under the contract the rate of interest varied from time to time does not operate to prevent the existence of a contractual rate. In consequence, the Tribunal admitted interest at so low a rate as 1½ per cent. in a case in which, under the contract, interest was payable at the usual commercial rate prevailing in Germany at the time (Case 847, *Schwerdt* v. *Frankfurter Bank*.‡ See also *Coit* v. *German Government* †). Interest runs up to the date when the admission of a debt is notified to the creditor Clearing Office (*In re Wolfgramm* v. *Paling*, vol. iii, *Recueil* 520).

Set-off and Counterclaim.—The principle as to cross claims has been enunciated in Case 839, *Empire Transport Co.* v. *Blumenfeld*.† If both the claim and the cross claim come within the clearing system, one is to be deducted from the other and the balance credited. If the cross claim is not a clearing debt, but arises out of the same transaction, and its ascertainment is merely a matter of calculation, it is allowed to be set off, in diminution or extinction of the clearing claim.

It should be noted that the report of a Master of the King's Bench Division, conducting an inquiry into the amount of a debt for the purpose of a vesting order under the Trading with the Enemy (Amendment) Act, 1914, is not treated by the Tribunal as conclusive as to either the amount or the existence of the debt (*Stamm* v. *Henning*, vol. ii, *Recueil* 875).

Property Rights and Interests

Article 297 (*e*) expressly confers upon the Tribunal jurisdiction to investigate the claims of British nationals, and to determine the amount of compensation to which they are entitled in respect of damage or injury inflicted upon their property rights or interests in German territory as

it existed on August 1, 1914. This provision has also led the Tribunal to consider other parts of Section IV, Part X, in which they are not expressly mentioned, but which relate directly, and have given rise to questions related directly to it.

The Tribunal have, for example, interpreted paragraph (*a*) under which incompleted liquidations were to be stayed and the property, rights and interests concerned returned to their owners as not applying to the liquidation of a company, part of the assets of which remained undisposed of. The Tribunal have declared that the provision applied only to specific items of property. In the same decision the Tribunal made an order under paragraph 5 of the Annex to Section IV, Part X of the Treaty for the restitution of matrices for pressing gramophone records as "a unique means of reproduction" (Claim 78, *Gramophone Co., Ltd.* v. *German Government* †).

In dealing with the claim of a broker against his enemy client for contango charges during the war in respect of stock "taken in" by him, the Tribunal have held that having regard to the provisions of Article 299, under which the contract was dissolved, there was from the date of dissolution no enemy property, right, or interest, in the securities to which the charge of the British Government under Article 297 (*b*) could attach (*Seligman Weinberger and Pearson* v. *Dreher and Uhry*, vol. iii, *Recueil* 749).

The Tribunal have not jurisdiction to entertain the claim of a German national under Article 297 (*b*), relating to the exercise by the Commonwealth of Australia of the right to liquidate German property (*Kurt Kuhn* v. *Commonwealth of Australia*, vol. iii, *Recueil* 516).

Considerations of space render it impossible to do more than mention at this point Article 297 (*f*) and paragraphs 1, 3, 6, 7, 10 and 13 of the Annex to Section IV, all of which are closely related to questions before the Tribunal, exercising its jurisdiction under Article 297 (*e*). The special questions arising under Article 297 (*h*) and paragraphs 11 and 12 of the Annex will, however, be touched upon separately.

Article 297 (e).—Many decisions of interest have been delivered with respect to seizures of property in occupied territory. It will be remembered that, whereas the right to compensation under Article 297 (*e*) is limited to property, rights or interests in German territory, under Article 232 in Part VIII, Germany undertook "to make compensation for all damage done to the civilian population of the Allied and Associated Powers, and to their property, etc." Article 242 provides that Part VIII of the Treaty does "not apply to the property, rights and interests referred to in Sections III and IV of Part X of the Treaty, nor to the product of their liquidation, etc."

The position was clear when the property rights and interests concerned were not removed from occupied territory, but were dealt with or consumed there (see *Weiss, Biheller and Brooks* v. *German Government*, vol. i, *Recueil* 850; Claim 100, *Jacobs Bros.* v. *German Government*,†

and Claim 1206, *London Merchant Bank Ltd.* v. *German Government* †). In cases in which the property concerned had been moved from occupied territory into Germany British claimants sought, in a number of cases, to establish that the Tribunal had jurisdiction to make an award in their favour under Article 297 (*e*). This would have relieved them of the necessity of having recourse to the less effective remedy afforded as reparations under Part VIII of the Treaty.

In *Tesdorpf and Co.* v. *German Government* (vol. iii, *Recueil* 22) the claimants were the owners of bags of coffee which were in warehouse at Antwerp at the outbreak of war. In February 1916 the coffee was loaded into trucks, and moved to Altona in Germany, marked as "fit for Army supplies." The value was fixed by the German Indemnification Commission. The claimants contended that the seizure in Antwerp could not have the effect of expropriating the goods which, therefore, remained their property on reaching German territory, and until dealt with at Altona. The Tribunal, however, held that the coffee was seized in Belgium in the exercise of the right of requisition afforded by Rule 52 of The Hague rules, and that the legal effect was to divest the claimants of their property in Belgium, and so outside German territory. The Tribunal held that such a requisition was a misuse of the right in that the coffee was not for the needs of the army occupying Belgium, but for other parts of the German army. They decided, however, that this could not render the requisition automatically of no effect.

The dispossession dates from the actual seizure, and not from the date of the receipt, which is only given as evidence to enable the owner to establish, at the proper time, his claim. (Claim 852, *Venesta, Ltd.*, v. *German Government* †).

In *Ralli Bros.* v. *German Government* (vol. iv, *Recueil* 41) cotton was seized in Belgium, contrary to International Law, and removed to Germany, where its value was assessed by the Imperial Indemnification Commission. The Tribunal decided that it was for such a seizure that provision had been made expressly in Article 232, by virtue of paragraph 9 of Annex I to Section I, Part VIII of the Treaty.

On the other hand, in Claim 296, *Spedding* v. *German Government*, the claimants were the owners of bales of woollen rags consigned to Lodz, in Russian Poland. They had reached Sczypiorno in Poland when the war broke out, and they were returned for safe custody by the German authorities to Germany, where later they were taken over. The owners were compensated under Article 297 (*e*).

In *Ford & Co.* v. *German Government* (vol. iv, *Recueil* 70) the claimants were the owners of wheat in the hold of a ship in the port of Antwerp. The wheat was unloaded and removed by the German authorities to Germany, where it was compulsorily sold. The purchasers notified the claimants' agent that they had credited the claimants with the purchase price. The Tribunal decided that they had jurisdiction to deal with the claim not for compensation for the seizure, but in respect of the deprecia-

tion of the purchase price during the period for which the German Imperial Decree of September 30, 1914, forbidding payments to Great Britain, was operative.

Where, however, there is clearly a seizure by the German Government, and a subsequent valuation by the competent German authority, the obligation of the German Government is created only by the Treaty, and in consequence there can be no debt of the German Government during the war to be affected by the above-mentioned decree (Claim 120, *Antony Gibbs & Sons* v. *German Government*). German territory includes the territory of the former German colonies. (*Lewa Rubber Estates* v. *German Government*, vol. iii, *Recueil* 29).

In dealing with a claim for compensation under Article 297 (*e*) or for cash assets under Article 297 (*h*) the Tribunal will inquire whether there are British nationals whose property rights or interests have suffered damage or injury from the exceptional war measures complained of (*Executors of F. Lederer deceased* v. *German Government*).

The German Imperial Decree of September 30, 1914, has formed the ground for awarding compensation to many British subjects. In some cases repatriated internees have been unable to bring with them to England the amounts of their deposits in Germany. In such cases the Tribunal takes the sterling value of the deposit at a convenient date after the return of the claimant to England (see Claim 438, *Woodcock* v. *German Government* †). In other cases, exemplified by Claim 711, *Bluhm* v. *Bluhm and Another, or the German Government,*† the claimant has been entitled to receive money from Germany during the war under a testamentary disposition, and the executors have refrained from making payments on account of this decree. Again, the Tribunal have taken a similarly convenient date at which the claimant might have received his money, and arrived at the value in sterling of the marks in Germany. From such value they have deducted the sterling value on a second date. The decree was abrogated on January 11, 1920, and the date now taken appears to be early in 1920 (see *Ford* v. *German Government*, Claim 426, *Westendarp and Another* v. *German Government* †). In some of the earlier cases the Tribunal have taken a later date (*Bluhm* v. *German Government*). The Tribunal disallowed a claim for compensation in a case in which it was clear that the executors had failed to pay legacies through difficulties connected with the administration of the estate (Claim 498, *Hamm* v. *German Government* †).

As to securities remaining in Germany the Tribunal have never been prepared to assume that the claimants would necessarily have sold them, and have converted the proceeds into sterling before depreciation, even if they had not been subject to the decree of September 30, 1914, or that of October 7, 1915 (*Bluhm* v. *German Government*, *supra*). The Tribunal will look at all the surrounding circumstances, and, where so satisfied, have made the necessary inferences and awarded compensation (*Green* v. *German Government*, vol. iii, *Recueil* 522).

The Tribunal decided in Claim 431, *Jacobi* v. *German Government*, that, whilst a payment to the Treuhänder after November 11, 1918, was voided, by virtue of the second part of paragraph 1 of the Annex to Section IV, the receipt of the money by the Treuhänder is an exceptional war measure, and might found a claim for compensation under Article 297 (*e*). Proceedings through the Clearing Offices under Article 296 are a necessary preliminary to the ascertainment of damage in such a case. In consequence the Tribunal have stayed proceedings to enable this to be done. The same course has been followed in other cases, *e.g.* Claim 309, *Walenn* v. *German Government*,† and *Fletcher* v. *German Government* (vol. iii, *Recueil* 755). In the latter case the Treuhänder notified a German debtor that he took under his administration the debt due to a British national, and that he debited the German debtor accordingly, but he took no further steps in the matter. This was held to amount to an incompleted liquidation, and by virtue of Article 297(*a*) the British creditor's rights were restored on the coming into force of the Treaty. It was, however, an exceptional war measure under Article 297 (*e*) and the British creditor may be entitled to compensation. The Tribunal gave him an opportunity to exhaust his rights against his German debtor. (See also Claim 493, *Posselt* v. *German Government* †).

The following exemplify exceptional war measures:

1. The action of the liquidator of a business in Germany, who imposed upon purchasers a condition that they should pay off a loan secured by mortgage, because it was a debt due to an Englishman (*Wightman and Balfour* v. *German Government*, vol. ii, *Recueil* 878).

2. The seizure of cloth under the Imperial decree of June 24, 1915 (Claim 178, *Behrens* v. *German Government*).

3. The requisition of goods by military authorities in German East Africa (Claim 582, *Kamna Rubber Estates* v. *German Government*).

On the other hand, the following have been held not to be exceptional war measures within the meaning of Section IV, Part X of the Treaty.

1. Measures against the person. Military acts, the consequence of orders issued by military superiors, and dictated by purely military consequences (*Edgley* v. *German Government*, vol. iii, *Recueil* 217).

2. Internment. (*Breuminger* v. *German Government*, vol. iii, *Recueil* 20).

3. The requisition of native labour. The levy of taxes prior to November 11, 1918 (*Lewa Rubber Estates* v. *German Government, supra*).

4. The sale, pursuant to administrative regulations, of a cargo which was rapidly deteriorating (Claim 41, *Bradford & Sons* v. *German Government* †).

5. The termination of the employment of a British subject, following upon measures to that end in the proper German administrative courts (Claim 298, *Smith* v. *German Government* †).

6. The circumstances giving rise to the departure of a British consular official following upon the withdrawal of the Consul-General's exequatur (Claim 528, *Rooke* v. *German Government* †).

7. The loss of luggage of a British internee, who was being repatriated (Claim 2069 *Shutte* v. *German Government* †).

8. The stoppage of a steamer on the high seas. The subsequent exercise of a right of search and the order to proceed to port. Detention during Prize Court proceedings. (Claim 271, *John Slater, Ltd.* v. *German Government* †).

In assessing compensation in respect of property taken over by the Treuhänder, the Tribunal do not set off the amount of the benefit derived by the claimant from his receipt of the proceeds of sales and cash assets under Article 297 (*h*) in sterling at the Treaty rate of exchange (Claim 672, *Rice* v. *German Government* †).

Article 297 (h).—This provision directs that the proceeds of sales of enemy property, and "in general all cash assets of enemies," shall be credited through the Clearing Office. The provision as to cash assets applies "only to such cash assets as are in the hands of one acting officially for the German Government as a result of German exceptional war measures" (Claim 90, *Marcus* v. *German Government*†). In a case in which the Treuhänder took over a savings bank book, it was held that the balance at the bank was to be considered cash assets (*Bornefeld* v. *German Government*, vol. iv, *Recueil* 56).

Article 297(*h*) does not apply to moneys in the hands of an individual (Claim 711, *Bluhm* v. *Bluhm and Another, or the German Government, supra*).

Having regard to the provision of the second part of paragraph I of the Annex to Section IV, moneys received by the Treuhänder after November 11, 1918, are not to be treated as cash assets (Claim 431 *Jacobi* v. *German Government, supra*).

The British Clearing Office has no right to receive cash assets or the proceeds of liquidation under Article 297 (*h*) other than the right of its national. The Government is no more than the intermediary to receive and hand over such proceeds of liquidation or cash assets to its national (*Lederer* v. *German Government, supra*). In *Dewhurst and Others* v. *German Government*, vol. iii, *Recueil* 525), the Tribunal imposed upon the British Clearing Office the duty of securing that effect be given to the testamentary dispositions of a German testator.

The right to receive cash assets, or the proceeds of liquidation, is limited to the cases as to which the Tribunal have jurisdiction under Article 297 (*e*) or within the field of Article 297 (*b*). It therefore follows that the geographical limit imposed on the Tribunal's jurisdiction by Article 297 (*e*) applies, and that an order cannot be made for the crediting of the proceeds of liquidation resulting from the seizure of goods in invaded territory (*Ralli Bros.* v. *German Government, supra*).

Contracts, Prescriptions, Judgments, Etc.

Under the provisions of Article 299(*b*) the British Government gave notice on July 9, 1920, to the German Government that the execution of

contracts conferring proprietary rights on shareholders of companies, and of contracts for the constitution of companies, was required in the general interest. The Tribunal have decided that such a notice did not cover a German Commandit partnership, which, therefore, is dissolved from the time when the partners became enemies (*Jaffe* v. *Gutkind*, vol. iv, *Recueil* 20).

The Tribunal declined to interfere, under Article 302, with a judgment of a German Court against a British national or to award him compensation for measures of execution against his property under Article 300(*b*) in a case in which he was unable to show that in the proceedings against him he was not able to make his defence, or that the measures of execution of which he complained were on account of failure to perform any act or comply with any formality (*Breuninger* v. *German Government, supra*).

The Tribunal will exercise its jurisdiction under Article 302 only in proceedings directed against the individual creditor, who obtained the judgment complained of. Such proceedings should not be directed against the German Government (*Smith* v. *German Government, supra*).

Under Article 304 the Tribunal have awarded damages to a British national, interned in Germany, whose bank in Germany wrongfully refused during the war to allow him to draw on his account (Claim 66, *Davis* v. *Bayerische Handelsbank* †).

At the request of the parties the Tribunal have considered the claim of a German party to a contract under Article 304. The question of their jurisdiction is not discussed in their decision (*Gumprecht & Co.* v. *Gibbs & Sons*, vol. iii. *Recueil* 779).

The Tribunal do not appear ever to have exercised their jurisdiction under Articles 305, 308 or 310 of the Treaty.

NOTES ON INTERNATIONAL LAW.

Switzerland and the League of Nations.—Among all the countries of the world there is none that has been a firmer friend of international peace than Switzerland. It is hardly surprising, therefore, that her people should have been found taking an active part in the movement for organizing international relations through a League of Nations.

L'Association Suisse pour la Société des Nations has recently published, under the title of "L'Entrée de la Suisse dans la Société des Nations," an essay by M. William E. Rappard, professor at Geneva University, in which the history of Switzerland's connexion with the movement for the League is traced from its start, soon after the outbreak of the Great War, to the time of the final decision of the Swiss people, by referendum on May 16, 1920, to enter the League. A preface is supplied by M. Motta, who has recently been presiding over the meetings of the Fifth Assembly at Geneva.

Various allusions in the course of the narrative show that M. Rappard himself took a prominent part in the affairs about which he is writing, and he tells a plain and unvarnished, but nevertheless fascinating, tale of all that was done by this people, small in numbers but of high spirit and courage, towards the designing and consolidation of the scheme of the League.

Fortunately, both for the creation of a means of restoring peace and for the ultimate good of the world, various far-sighted individuals, not only in Switzerland but also in England, Holland, the United States of America, and some other countries, stimulated by the horror of the war, bent their minds, from 1914 onwards, to the novel and difficult problems involved in the systematic organization of international relations. Switzerland was, however, ahead of all other countries in the vigour and promptness with which her national Government took up the problem, and worked, long before the war ended, as well as during the sittings of the Peace Conference, for the establishment of the League as a vital part of the peace settlement.

The undertaking of the obligations and responsibilities involved in membership of the League was a matter by no means free from anxiety for the Swiss people themselves, and an interesting summary is given of the various arguments, pro and con, which pressed upon them. It meant, among other things, the surrender of that position of independence and detachment from alliances and European entanglements, which had been for a hundred years the corner-stone of their national

policy. After a full campaign of explanation and discussion the Swiss decided, by the referendum, to throw in their lot with the League. Out of 968,327 electors, 740,589, or 76½ per cent., voted in the referendum; of these, 416,870 were for entering and 323,719 for staying outside.

To English readers M. Rappard's booklet will appeal as an interesting page in the history of an interesting people. It will be recognized that Switzerland has done a fine service for humanity, and that the League, in fixing its headquarters at Geneva, has, at any rate, chosen a good mental atmosphere. In the United States of America such a narrative may well cause some searchings of heart.

F. N. KEEN.

The American Journal of International Law.—This *Journal* maintains its customary standard of excellence in the numbers for January and April 1924. The former is notable for Professor Manley Hudson's excellent summary of the Second Year of the Permanent Court of International Justice. The author remarks "that since the court was created, no question has been referred to a tribunal of the Permanent Court of Arbitration, though various special arbitrations have been arranged," and concludes that it is "improbable that the new court will be neglected because of a preference for specially chosen judges." This observation seems true of the cases in which parties are agreed that settlement by judicial method is desirable. The Corfu affair, however (which he summarizes on p. 24), shows that the Council of Ambassadors, in first invoking and then dispensing with the services of the Court in assessing the compensation to be paid to Italy by Greece, treated the Court cavalierly, and that the Council of the League at Italian instance preferred a Government-selected Committee of Jurists to the Court for an Advisory Opinion on the legal questions raised by the Corfu affair. Incidentally, Professor Hudson's instructive note on the precedents for Advisory Opinions (pp. 25–9) deserves study. To the author's summary of the Tunis-Morocco Nationality Question we would only add that the speeches of counsel in Publications of the Court Series C. No. 2 throw an instructive light on the national methods of advocacy. The no-flowers-by-request style of English counsel, in rigidly confining the Court to the bare question of relevancy before it, contrasted amusingly with Professor de Lapradelle's finished oratorical effort to bring before it by every device the merits of the case, which were strictly irrelevant. English readers of the note on the *German Settlers in Poland Case* may be referred for criticism to 2 *Pitt Cobbett's Cases on International Law* (4th ed.) 1923, pp. 357–8.

Professor J. W. Garner's well-documented account of the rules proposed at The Hague, 1923, for the Regulation of Aerial Warfare is welcome. For some unexplained reason the text of the Draft Code has not been officially published in England, although already available in

17 *A.J.I.L.* (Oct. 1923). The lack of official publication is the more regrettable as there is reason to believe that the Rules are approved alike by the British and the Dominion Governments. We should like to see them discussed by ex-flying officers as well as by lawyers, for some of them at any rate (on legitimate objects of attack) will have to be acted on by the very young men who form the fighting officers of the Air Force. Captain W. E. Elliott, M.P., made some trenchant observations, at the Buenos Ayres Conference of the International Law Association, on the futility of rules which lend themselves to infringement, or at least elastic interpretation, by such young men. Students may be referred to 31 *Report, I.L.A.*, pp. 222–5.

The April number contains an interesting address by Mr. C. E. Hughes, Secretary of State, on *Recent Questions and Negotiations* in which the United States has been concerned; a rather poor paper by the late Baron S. A. Korff entitled *An Introduction to the History of International Law*, and a useful paper on *The Opium Question*, by Professor Quincy Wright.

In the Editorial Comments, Dr. J. B. Scott writes on the much-contested announcement of the British Government made through Mr. Arthur Ponsonby, M.P., in April last, of its policy of submitting all future British treaties to Parliament for discussion before ratification. This the writer terms a step towards the "Americanization of the British Constitution."

Professor Quincy Wright has a useful note on the *Status of the Inhabitants of Mandated Territory*, illustrating the points that (1) mandated territories are not under the sovereignty of the mandatories, and (2) the native inhabitants are not nationals of the mandatories. In regard to (1) he summarizes the decision of the Supreme Court of the Union of South Africa, sustaining the indictment for high treason against Jacobus Christian, the leader of the rebellious Bondelzwarts in the mandated territory of South-West Africa. The writer approves the result, which accords with the power of States of the United States to punish persons for treason against themselves although they lack sovereignty as understood by international law (Wharton: *Criminal Law*, s. 1812), and (*semble*) agrees with the view of the Privy Council in *de Jager* v. *Attorney-General for Natal* [1907] A.C. 326. Other phases of the same question of sovereignty over mandated territories which have elicited opinions from the Permanent Mandates Commission are dealt with. In their practical effect on the exercise of sovereign rights these pronouncements tend to confirm the British view stated officially by Lord Milner in the House of Lords, July 29, 1920, that mandated territories of the "C" type were deliberately handed over to their mandatories with "the provision of the Article (viz. *Covenant*, s. 22) drawn in such a way as to make it clear that they would have no limitation on their (? internal) sovereignty except the particular limitation of the protection of the natives."

The writer gives a careful account of the problem of the status of the inhabitants of mandated territories so far as dealt with by the Permanent Mandates Commission. For completeness' sake, we should add that the question of according individual naturalization as British subjects to natives who continue to reside in British mandated territory came before the Imperial Conference, 1923, which resolved that the British Parliament should initiate legislation empowering naturalization of such persons, and incidentally dispensing in their case with the present requisite of five years' preliminary residence within the King's Dominions (in which term mandated territories are not included). The other point of interest is that an arrangement was recently made between the German Government and the Government of the Union of South Africa designed to facilitate the naturalization as British subjects of the ex-German settlers in South-West Africa who were not repatriated as the Treaty of Versailles permitted.

Teachers of International Law will find interest in the Note at p. 320 on *Exchange* v. *M'Faddon* (1812), 7 Cranch 116, the well-known American authority on the principle underlying the immunity of foreign public vessels from the local jurisdiction. An American undergraduate having persistently maintained the injustice of an American Court denying, on this principle, to American owners the possession of a vessel originally their property, but illegally seized by the French Government in 1809 and thereafter converted into a French public vessel, Professor J. S. Reeves was moved to search the U.S. Senate Documents, where he discovered convincing evidence that, after the war, compensation for the original illegal seizure was made by the United States Government and in part paid by the French. Poetic justice is thus satisfied.

Among the Judicial Decisions is included an interesting and unanimous determination of the *Mixed Claims Commission United States and Germany* on, *inter alia*, the measure of damages to be adopted in assessing claim for loss of life arising out of the *Lusitania* outrage.

A. H. CHARTERIS.

The British Year-Book of International Law, 1924.—This Year-Book has now reached its fifth year of issue, and its contents afford abundant and convincing evidence of the need for and the value of such a publication.

The activity of the "legislative" processes of international society, to which Professor Baker refers in his article on "The Codification of International Law," is now adding year by year to the volume of international law elaborated in statutory form.

This very activity affords, in Professor Baker's view, the strongest argument against any attempt to make a single comprehensive code of international law. He holds that "there is now in process of evolution in the institution of the League of Nations a working and hopeful alternative to the method of codification," namely, the method of legislation

which will permit development as fast as international society is ready for it, and will not restrict spontaneous growth. He distinguishes three legislative or quasi-legislative processes: (1) the process of international legislation by conferences of States which produce law-making conventions to which large numbers of States are parties, (2) the making of partial political arrangements which, though embodied in treaties signed by only a restricted number of States, constitute an essential part of world law, *e.g.*, the treaty providing for the neutralization of the Aaland Islands, and the Geneva protocols dealing with the financial reconstruction of Austria, and (3) "the customary practice and the resolutions of the Assembly of the League of Nations."

His summary of the international law created since the war by the first and most important of these processes, which he classifies under the three heads of constitutional, social, and commercial and technical law, shows how rapidly such law is growing under the new conditions created by the establishment of the League. He points out that, though much of this new international law embodied in conventions may not seem at first sight of great importance, "its true significance lies in the fact that it is for the first time regulating by legal rules the new international interests which result from the growing interdependence of the members of the society of States." In other words, we have here the steady growth of that international law of peace to which an article in the first issue of the Year-Book looked forward, and the absence of which, in the past, it ascribed to the undue preoccupation of the statesmen and jurists of the last century with the laws of war.

If these legislative processes are to achieve the results hoped for it is clearly of great importance that lawyers and students should watch them with close and critical interest. The Year-Book will give them great assistance in doing so. Professor Baker makes valuable suggestions in his article as to provisions, which might in future be made for facilitating the process of securing signatures and ratifications to general conventions prepared under the auspices of the League. Professor Brierly, in his article on "The Shortcomings of International Law," raises the question as to whether the "traditional doctrine" of the binding force of treaties does not require reconsideration. He urges that experiences of the last half-century show that it is "hopeless to look for the perpetual observance of treaties whose terms have ceased to accord with international ideas of what is right." Such an argument may obviously carry us on to very difficult ground, but it points to the vital importance of including in international conventions adequate provisions for revision of their provisions from time to time, so that they may be adapted to the ever-changing conditions of the world.

Then there is the question of the rules which are to govern the interpretation of international conventions; in his article on the Legality of the Occupation of the Ruhr, and in a suggestive supplementary note, Mr. McNair discusses the application of the *ejusdem generis* rule in inter-

national law, and inclines to the view that this rule is essentially the kind of rule to which Hall's remark is relevant: "There is no place for the refinements of the Courts in the rough jurisprudence of nations."

In addition to other articles of interest and importance on a number of special questions, the Year-Book includes analyses of international conventions concluded during the period under review, references to others in course of preparation, summaries and reports of decisions and advisory opinions given by the Permanent Court of International Justice, and other international tribunals set up for special purposes (the Commission of Arbitrators on Anglo-American Pecuniary Claims, and the German-American Mixed Claims Commission), and summaries of events of international significance which have taken place, and of publications of international interest which have appeared during the period; study of these features shows how much there is to record, and how necessary it is to provide year by year a volume in which all this information is carefully collected and arranged in a convenient form.

R. Feetham.

Revista de Derecho Internacional.—The December number of the *Revista de Derecho Internacional* of Habana contains notices of the work of two teaching establishments in that city, instituted on the proposition of her distinguished citizen, Señor A. Sanchez de Bustamante, namely, the Diplomatic and Consular Seminary, founded, as its name implies, for instructing the aspirants to the diplomatic and consular careers in the learning necessary to the satisfactory discharge of their offices, and the School of Private International Law, which is studying, among other subjects, the Doctrine of the Qualifications, the doctrine, that is, which determines the application of foreign law to internal jurisprudence, in such a way as to systematize as far as possible the applicability of foreign law, apparently as foreign law, to concrete cases.

The March number contains, as is usual, many able articles and much useful information. Dr. Camilo B. Trelles, professor of international law in the University of Valladolid, writing on the establishment there of a Section of American Studies, compares Monroe, the politician, with Francisco de Vitoria, one-time professor in the University of Salamanca and a moralist, and points out that the doctrine of the former, being dictated by circumstances, is not immortal, while the work of the latter is lasting. "He wrote in a time of imperial omnipotence, when the legists defended the universal authority of the Emperor as something absolute, considering his right to conquer and colonize America as beyond discussion. Francisco de Vitoria was not an accommodating spirit; for the illustrious theologian, above the notorious egoism of his country, was the duty of being just. This emotion of justice was his guide."

Dr. James Brown Scott argues effectively that international law accepted by the nations is true law, although sanctions imposed by a superior power are wanting. Writing on the Codification of Public and

Private International Law, he mentions that at the Pan-American Conference, held last year at Santiago de Chile, it was agreed that a special meeting of jurists, two appointed by each American nation, should meet at Rio de Janeiro in 1925 to discuss the subject. It seems a pity to exclude European jurists from a meeting which, like the Pan-American Conference, may tend to establish a form of international law which would not be universal.

Perhaps the most useful contribution is that by Sr. Francisco J. Urrutia, Minister Plenipotentiary of Colombia, on the Early American Congresses and Conferences, leading up to the Pan-American movement, which should be read in full, as it contains information not always at hand, and is not easy to summarize.

Recent treaties and conventions affecting the New World occupy some sixty pages.

It is evident, from the contents of the current number (10) of the *Revista de Derecho Internacional* that the allied subjects of citizenship, nationality and the position of the foreigner are much absorbing the attention of the island publicists; and so we find articles by Dr. José A. del Cueto on the basis for a bill on Cuban citizenship and the rights of foreigners, by Dr. Gerardo Portela, who upholds the authority of the law of the domicil, modified by renvoi and another by Dra Laura Betancourt, which is concerned chiefly with the defects of the law of 1870 in unduly restricting the competence of the Cuban Courts in the matter of the divorce of foreigners. In the last 54 pages are to be found the texts of numerous treaties between the Argentine Confederation and other American States.

WYNDHAM A. BEWES.

Conflict of Laws in Bankruptcy Matters.—Among the papers printed in the volume of *Transactions* of the Grotius Society for the year 1923 is an address by Dr. Leslie Burgin which discusses the difficulties often involved in bankruptcy administration and the liquidation of companies as a result of the differences in law and procedure prevailing in different countries.

The development of world trade has brought about the result that an insolvent estate nowadays often includes properties situate, and businesses carried on, in various countries, and in connexion with such businesses there are often local creditors. Complications follow for numerous reasons. In some countries the law contemplates that there should be a pooling of the whole assets and liabilities of the bankrupt, wherever situate or incurred. In others it is held that property in each country should be dealt with separately, and applied primarily in the full discharge of local claims in that country. There are differences of law and practice also between different countries as to the treatment of moveable and immoveable property respectively, as to the extent to which rights may depend on the domicile of the debtor or the situation of the

property, as to the relative spheres of law and procedure, as to the granting of priority to the claims of certain classes of creditors, and as to many other important matters. The only thing that appears certain is that a trustee or liquidator or syndic who, acting in the interests of creditors in one country, desires to obtain for them the benefit of property of the debtor in another country, is sure to meet with every possible difficulty in establishing and enforcing his claims.

Dr. Burgin points out that, under modern business conditions, traders and trading companies have world-wide activities, and he ends by saying that the conclusion he has arrived at is " that in a state of world insolvency and international conditions of unprecedented difficulty, the international character of bankruptcy is forcing itself upon the legal and the trading communities, and that it is time steps were taken to endeavour to procure unanimity, and, at all events, uniformity, by means of an international convention dealing with the leading points covered by this address."

When the League of Nations is short of work it will find, in the negotiation of such a convention, a task ready to its hand.

F. N. Keen.

The Academy of International Law at The Hague.—The Hague Academy of International Law was founded with the co-operation of the Carnegie Endowment for International Peace in 1914, and but for the outbreak of the war would have opened its doors in the following year. In 1922 the Curatorium of the Academy deemed the time opportune for commencing operations, and at its meeting in September at Grenoble it decided to hold the inaugural session at the Palace of Peace on July 14, 1923. The courses of instruction accordingly commenced on July 16 and terminated on August 28, being divided into two periods by a break of ten days. The two main objects of the Academy are to further the study of Public and Private International Law by means of lectures and seminars and to internationalize such study by gathering together lecturers and students of diverse nationalities. As Dr. James Brown Scott, the leading protagonist of the scheme, declares, the idea was that the lecturers drawn from different countries would, as it were, meet on neutral ground, and that they would not only expound to the students likewise drawn from different countries, but discuss among themselves the theory and practice of international law as it obtains in their respective countries. By personal contact they would learn their various points of approach, the reasons for divergent practices, and be in a position to suggest means by which these divergencies might be overcome in practice as they are in theory.

From almost every point of view it may be said that the experiment has proved an unqualified success. The services of a large number of the leading international jurists were secured, and students attended in larger numbers than could be accommodated in comfort. In the first

period they numbered three hundred and six from twenty-nine countries, and in the second three hundred and fifty from thirty-one countries. The lectures were confined to the discussions of international law in time of peace, though it is difficult to appreciate the decision to postpone the discussion of international law in time of war. Such discussion must take place some time, and the sooner the better, when the details are fresh in the minds of many who might contribute to the solution of difficult problems. The decision to adopt in these gatherings the exclusive use of the French language also seems to deserve further consideration. Few of the non-Latin races possess sufficient command of the French tongue to make themselves readily understood by other foreigners. English might well be an alternative language, in view of the large number of students who understand it.

Arbitration Treaties among American Nations.[1]—The Carnegie Endowment for International Peace have published a painstaking collection of arbitration provisions from many treaties—228 in all—made between American nations, and ranging in date from 1822 to 1910. The provisions are quoted textually, without comment, but foot-notes are added to indicate the facts as to ratification or non-ratification, the sources from which the treaties are obtained, and the language of the original texts. Each set of provisions is headed by a serial number, the names of the parties to the treaty, the date and place of its signature, and a concise description of its character. There are two Tables of Contents, one arranging the treaties chronologically, and the other alphabetically, according to the parties.

Some of the treaties are between two States only, some are made by a group of States. The general Hague Conventions of 1899 and 1907 for the pacific settlement of international disputes are also included, the former having 44 States as parties, and the latter 30 States, and both including many non-American Powers.

The treaties are of various kinds, and there is considerable variety in the purpose, scope, and wording of the arbitration clauses set out. In many cases they provide for arbitration arrangements of a more or less general character between the parties ; some refer to existing disputes about boundaries, financial claims, or other matters ; some to disputes of any kind arising in reference to the subject-matters dealt with in the particular treaties. Some deal with the carrying out of a work in which the parties are jointly interested through Commissioners appointed by them, and provide for some form of arbitration in case of a cleavage of opinion within the Commission. Some of the provisions do, some do not, give detailed directions as to matters of procedure in connexion with the arbitrations.

[1] *Arbitration Treaties among the American Nations to the close of the year* 1910. Edited by William R. Manning. Published 1924, for the Carnegie Endowment for International Peace, by the Oxford University Press, American Branch, New York. Price $3.50.

Several of the treaties are of the widest character, making provision for settlement by arbitration of all disputes, regardless of their nature, arising between the parties, and for the entire exclusion of any resort to war. It would be treading on delicate ground to inquire whether the high principles thus invoked have in all cases been strictly adhered to.

No. 195 provides for a judicial type of tribunal. It is a Convention between Costa Rica, Guatemala, Honduras, Nicaragua, and Salvador, signed at Washington on December 20, 1907, providing for the setting up of the "Central American Court of Justice," and binding the parties to submit to it all their controversies, of whatsoever nature, in case the respective Departments of Foreign Affairs should not have been able to reach an understanding.

No. 199, between Mexico and the United States, signed on March 24, 1908, is in a form followed, more or less, in various later treaties between other parties, providing that differences of a legal nature or relative to the interpretation of treaties shall be referred to the Permanent Court of Arbitration established under The Hague Conventions, provided that they do not affect the vital interests, independence, or honour of either of the parties, and do not prejudice the interests of a third party; the matter in dispute is to be defined in a special agreement to be made between the parties in each case before appealing to the Court of Arbitration.

The forms of procedure adopted for securing the appointment of umpires, or independent presiding members of arbitration tribunals, differ considerably in different cases. Space does not permit of their citation here, but a study of them may well provide useful material for consideration in connexion with any new plans for international arbitration; and indeed the whole book will repay perusal by those who are specially interested in the arbitration question at this time, showing, as it does, ideas which have been propounded and accepted, at one time and another, by a group of States which have clung long and tenaciously to methods of arbitration for dealing with international disputes.

F. N. Keen.

The International Review of Agricultural Economics.—At the present moment there is no more vital subject in English politics than the necessity of making our agriculture once more a prosperous part of the national life. It would be interesting to know how many of our politicians, even of the rural constituencies, read regularly the most valuable quarterly journal published by the International Institute of Agriculture at Rome (Villa Umberto I, Rome 10). The last number to reach us (Jan.-March) is a model of what such a publication should be. It has articles on Share Tenancy in Italy, Agricultural Co-operation in India, and on kindred social institutions in Switzerland, Belgium, Bulgaria and other places. It is, in short, a journal on the comparative agricultural customs of the world. The legal

readers of this *Journal* will not need to be reminded that the social habits of one generation are apt to become the statute book of the next. In these co-operative habits of peasants we have a basis for a code drawn up by experts. The forty-page article on Share Tenancy in Italy should be carefully considered by anyone devising similar schemes elsewhere, for Italy is the most alive in the methods of social co-operation. This is, perhaps, because Italy has never forgotten the communal habits of the Middle Ages, when it was an instinct for almost every man to combine with his fellows in all departments of industry and trade. The more modern (and therefore more backward !) Englishman will be astonished at the vitality of Italian social life.

G. R. Stirling Taylor.

Uniformity of Merchant Shipping Legislation.—The following resolution was adopted by the Tenth Congress of Chambers of Commerce of the Empire, which took place in London in July last :

This Congress re-affims the urgent necessity of an immediate effort being made to have effect given to the resolution adopted at the Toronto Conference (1920) reading :

That the time has arrived for a review of the Merchant Shipping legislation of the various parts of the Empire with a view to the repeal of all existing legislation and the substitution therefor of an Empire Merchant Shipping Act, to apply to all vessels entering or clearing at any Custom House within the Empire.

NOTES.

The late Wallwyn Poyer Burnett Shepheard.—The Society of Comparative Legislation has lost one of its original and most valued members in Mr. Wallwyn Poyer Burnett Shepheard, who, as the writer regrets to have to record, died at his residence, Dunmow Villa, East Sheen, on May 16. Born in 1840, Mr. Shepheard received his early education at the Merchant Taylors' School, after leaving which he entered the office of the Mutual Life Assurance Society. He remained there from December 1855 to March 1864, when he resigned his appointment and entered Jesus College, Cambridge, having decided to study law. In due course he was called to the Bar by Lincoln's Inn in 1871. For a year he read in the Chambers of Mr. Horace Davey, Q.C., afterwards Lord Davey, who testified to his " conscientious attention to details and the general accuracy of his work," characteristics attributable no doubt to Mr. Shepheard's training in a life insurance office, where he originated a plan whereby the labour of making the annual valuations of his company's assets and liabilities was greatly reduced.

Interested in family estates in Barbados, Mr. Shepheard was the prime mover in the organizations which were established towards the end of last century to release the West Indian cane sugar industry from the bondage of the foreign bounty system and it was his untiring work that paved the way to the abolition of bounties by International Agreement embodied in the Brussels Convention of 1902. As further evidence of his public spirit it may be stated that when a grave political crisis arose in Barbados in the seventies he acted as London representative of the Defence Association whose representations, with those of the House of Assembly, led to the recall of the then Governor, thus averting, as it was believed at the time, the danger of serious rioting, which appeared to be imminent. Mr. Shepheard also brought to bear on many other West Indian problems a logical mind and a wide legal knowledge ; and his judgment was rarely, if ever, at fault. He joined the West India Committee in 1872 and was for many years a respected Member of the Executive of that ancient body to whose permanent staff he was always ready to give assistance and advice. It was indeed largely through his efforts that that historic Committee received the grant of a Royal Charter from King Edward VII in 1904, and after being a " rope of sand " for nearly two centuries became a legal entity. Mr. Shepheard was a member of the Society of Comparative Legislation from its first establishment in 1894,

and a contributor to the *Journal* of abstracts of West Indian Legislation for several years besides weighty articles on "Suzerainty," "The Most Favoured Nation Treaties" and "West Indian Federation." In recognition of his services he was appointed by the Council an Honorary Life Member of the Society in 1915. Mr. Shepheard was also the author of articles on the several British West India Legislations and of their historic constitutions, which were published in the *German Encyclopaedia* in 1912.

A man of sterling worth, of courteous demeanour and of great integrity, Mr. Wallwyn Poyer Burnett Shepheard will be much missed.

ALGERNON ASPINALL.

Uniformity of Legislation in Canada.—We have now before us the proceedings of the Sixth Annual Meeting (1923) of the Conference of Commissioners on Uniformity of Legislation in Canada. The United States began these Conferences in 1892, and much useful work has been done; Canada followed suit in 1918. In view of the vastly increasing movement of modern life, there is hardly a department of legislation of which it may not be said that national uniformity is not desirable. In spite of dissimilar systems of law, it is fairly attained in Great Britain, through the agency of a single, unfettered Parliament for England and Scotland. In the United States and Canada, on the other hand, the federal constitutions have left large legislative independence to the States and Provinces, of which they have made extensive use before public opinion has seen the needs of uniformity. And now it has to batter against walls of prejudice. So far the Canadian Conference has succeeded in securing the general adoption of the two English code laws, the Sale of Goods Act, 1893, and the Partnership Act, 1890; and these adoptions are not shared by Quebec, where French law prevails. The Conference, after full discussion, appears to have ready for adoption Bills on the following subjects: legitimation by subsequent marriage, bulk sales, conditional sales, warehousemen's liens, fire insurance and life insurance. Besides these, bills on companies, succession duties, workmen's compensation, wills, and others, are in the hands of committees. The work of the Conference is necessarily attended with expense, and several of the provinces have provided for the travelling and other expenses of their commissioners, who give their services without personal remuneration. Sir James Aikin's presidential address at the Conference of 1923 urges the Legislatures to be up and doing. He warns them that "people will not continue to suffer constant inconvenience and economic loss from divergent provincial business laws, but, to prevent such, will urge federal legislation," to be authorized by a further transfer of powers to the Central Government, so as to deal with matters practically, if not technically, of inter-provincial concern. This solution would perhaps be the best for the public.

A. G.

Public and Private Agencies.—Under the somewhat unsatisfactory title of *Public Agencies and Private Agencies*, Mr. James D. Barnett of the University of Oregon examines the legal distinction between things private and things public (*American Political Science Review*, February, 1924, p. 34). A painstaking examination of a large number of American decisions, and of some treatises, leads him to the conclusion that the attempt to establish a logical principle of distinction between the two has been futile. It is quite easy to pick holes in any system of classification in this way, but the practical or theoretical value of the process is another matter.

According to Jowett's famous aphorism, logic is neither an art nor a science, but a dodge, and all systems of classification are a result of the subtlety or infirmity of the human intellect. Nature never classifies, but man must do so in order to obtain any real comprehension of a subject. But, while admitting the necessity, he must remember that he is merely practising an aid to memory and thought. From the nature of the case no classification can be water-tight; there will always be exceptions and borderland instances.

The practical problem is to evolve distinctions that will appeal to the mind as logical, and at the same time will fit a very large proportion of the actual facts. Judged by this principle, the legal distinction between public and private has usually seemed of paramount importance. Holland only echoes the general sense of juristic thinkers when he says:

"This distribution of the whole field of law is of such capital importance that we have no hesitation in adopting the division of rights out of which it springs as the radical division of them."

The greatest merit of the distinction is that it falls in with the distribution that all men make of their ordinary affairs. Everybody divides his life into his private business and his public actions. The latter may range from the highest imperial services to membership of the committee of the village cricket club; but in the vast majority of instances nobody has the slightest difficulty in distinguishing between the two.

In the field of law the distinction has been regarded as capital because of the greater inconvenience of the rival schemes. As Mr. Barnett observes, Austin followed Hale and Blackstone in rejecting the classical division. One of the results was that Blackstone was forced to treat constitutional law as a subordinate division of the "Rights of Persons." An absurdity of that kind is enough to condemn any system that necessitates its adoption.

Finally, it must be remembered that the aspects of law are continually changing in a progressive society. An American judgment contains this pregnant remark:

"It must be admitted that many things are considered as public use now that were not so considered a half or even a quarter of a century ago, and it may be, and it is probable, that in the not distant future many things which are now considered a private use, by the changing

conditions and evolution of business, will of necessity become a public use. . . ."

Under feudal law even jurisdiction was a matter of private right; in a socialized state the milkman might be a public official.

H. J. R.

Irish Chief Justices of Victoria.—In connexion with the article on the Consolidation of the Law in Victoria (*supra*, p. 255) the Hon. Donald Mackinnon recalls that, of the five Chief Justices of Victoria, all but one have been Irish: Sir William Stawell (a kinsman of the late Master of the Rolls, Henn Collins), Higinbotham (who consolidated the statutes of Victoria in 1865 and 1890), Sir John Madden and the present Chief Justice Sir William Irvine (a nephew of John Mitchell, well known to Irishmen). Among other Irish judges was a great equity judge, Sir Robert Molesworth, and, last but not least, an Australian-born Irishman, Sir Leo Cussen, whose public service is the subject-matter of the article above mentioned.

Jurisdiction over Foreigners in Turkey.—The Treaty of Lausanne, although ratified by Turkey and Great Britain, has not, at the time of writing, come into operation; but the Ottoman Government is preparing for the complete abolition of the capitulatory system which is contemplated by the terms of the Treaty and the Conventions attached to it. An interesting article appears in a recent number of the *Journal du Droit International* of Edouard Clunet by Dr. Ténékidés concerning the problems of private international law which the Ottoman Courts will now have to face.

The convention respecting the conditions of residence and business and jurisdiction over foreigners contains no rules on the matter save a general clause that all matters of jurisdiction shall, as between Turkey and the other contracting Powers, be decided in accordance with the principles of international law; and that the Turkish Courts will ensure to foreigners, both as regards person and property, protection in accordance with international law on the principles and methods generally adopted in other countries.

Hitherto there have been no rules of private international law in force in Turkey, but a number of peculiar rules with regard to jurisdiction have been established in the application of capitulatory rights. These peculiar rules will no longer have any application, and, as the author of the article shows, Turkey will now have to attach herself to some system of private international law and to embody in its code certain principles which form its essential elements and which will have to guide Ottoman judges in dealing with the rights of foreigners.

It is a fine open field for the Ottoman jurists to work; there is, anyhow, one very distinguished jurist in such questions practising in Constanti-

nople, Dr. Salem ; and perhaps the Turkish authorities will be able to invoke his aid.

The essential principle of the convention with regard to jurisdiction is reciprocity ; foreigners in Turkey will have the same rights of suit in the Turkish Courts as Ottoman subjects enjoy in the Courts of the foreign Power. But there is one remarkable derogation from this principle, which lays down that in matters of personal status—that is, questions relating to marriage, divorce, guardianship of children, capacity, majority interdiction and succession to personal estate—in general, family law—as regards non-Moslem nationals of the foreign Powers in Turkey, it is not the Turkish Courts which will primarily have jurisdiction, but the national tribunals or other competent national authorities established in the country of the party whose personal status is in question.

Exceptionally, Turkish Courts will enjoy jurisdiction in these matters if all the parties to the case submit in writing to the jurisdiction of the Courts ; and in that case they will apply the national law to the parties.

The provision of the convention reserves the possibility of granting to consuls non-litigious jurisdiction in such matters in accordance with any special agreements which may be concluded. This conferment of jurisdiction in the questions of personal status of foreign subjects on their national Courts outside the country will, however, be a peculiar institution of the Ottoman Law and is likely to give rise to difficulties in practice. The Court which tries a case of disputed married right or rights of succession will frequently be unable to obtain the witnesses, and will have to receive evidence taken on commission ; while the parties to the suit will be under the need of repairing to the foreign country in order that their case may be heard, unless they all prefer to entrust their case to the Turkish Court. It would appear that, if any single party requires the matter to be dealt with in the national Court, the Ottoman Court will not have jurisdiction.

As is pointed out by Dr. Ténékidés, the Turkish Delegation at Lausanne was anxious above everything to eliminate from the judicial system of its country every foreign element, and failed to take account of the fact that the Turkish sovereignty was no less impaired by the arbitrary restriction of the application of a *lex fori* to the questions of personal status of foreign subjects. The integrity of the sovereignty should have been considered under both aspects ; whereas in fact it was considered only in the single aspect of the abolition of foreign Courts.

The Consular Courts which have in the past dealt with these questions of foreign subjects as part of their wide jurisdiction, would appear to have been better qualified for dealing with them in the new conditions of Turkey than the national Courts of the foreigners ; but the Turkish representatives at the Peace Conference were eager above all to have done with any foreign tribunal sitting in their country.

It is to be noticed that the Turkish Courts will be exclusively competent in matters of personal status of foreign subjects who are Moslems ;

under the capitulatory system a foreign subject, whatever his religion, came under the jurisdiction in these matters of the consul, the criterion of jurisdiction being not religion but nationality. The change in this respect may operate hardly on Moslem subjects of the foreign Powers in Turkey; because, since the Treaty was made, the Government of Angora has abolished the religious Courts throughout the Ottoman Empire, and therefore any question of personal status of Moslems will be dealt with by the ordinary Civil Courts, which may not be fully qualified to appreciate the principal differences of the various rites of Moslems.

The abolition of the capitulations will have no retrospective effect, and will only come into force when the Treaty itself comes into operation. That was expressly laid down by the Conference. Moreover, the provisions in the Treaty of Lausanne and the annexed Conventions only apply to the contracting Powers; and neutral States such as Denmark, Scandinavia, Holland and the United States are not directly affected; but the example of the convention recently made between the United States and the Ottoman Government indicates that the abolition of peculiar privileges of foreigners will be general, and that the States not party to the Treaty of Lausanne will have to enter into special treaties with the Turkish Government with regard to the rights of their subjects, which will be based upon the terms of the Treaty.

N. B.

The Codification of the Criminal Law in Poland.—Before the liberation of Poland its territory was subject to four different codes of criminal law, which prevailed in different parts of the country, viz.: (1) the Russian Penal Code of 1845, (2) the Austrian Penal Code of 1852, (3) the German Penal Code of 1871, and (4) the Hungarian Penal Code of 1878. All these codes are said to have been of mediocre value and much out of date. One effect of the occupation of Poland by the Germans and Austro-Hungarians during the recent great war was that the provisional Council of State set up by them adopted and promulgated the Russian Penal Code of 1903, which is described as *un des plus scientifiques et des plus progressifs parmi les Codes continentaux contemporains.*

When Poland was liberated and reconstituted the necessity of a unification of its penal legislation was recognized, and it was hoped that the Russian Code of 1903 would have been adopted as the basis of such unification; but, unfortunately, political considerations prevented this solution. In 1919 a Commission of Codification was appointed by the Polish Republic. This Commission, or rather a subsection of it, to which Criminal Law was assigned, in August 1922, issued a rough draft (*avant-projet*) of the general part of such a code. There was also issued another separate draft (a sort of minority report) by Professor Makowski, the Vice-President of this subsection. Thus there were two drafts, one of an official character, and the other of a private or individual character. The

little book, of 122 pp., before us,[1] by Professor Garraud of Lyons, is published by the Institut de Droit Comparé de Lyon, and is devoted to a minute critical examination of the differences between these two drafts or reports.

It is of course impossible here to follow in detail this examination. It must suffice to say that the same problems seem to require solution in Poland as elsewhere, such as, the best order to be followed in the arrangement of a code, the application of the law to minors, penalties and measures of prevention, the nature of attempts and participation in crime, criminal responsibility, the defences of constraint and necessity, habitual and professional criminals, liberation and *réhabilitation*, about which there are differences of opinion amongst jurists all over the world, according to the different temperaments and social organization in different countries. Thus, by *réhabilitation* is meant the *réintégration*, or restitution of rights, of which a prisoner has been deprived as part of his sentence, as the result of good conduct. It is needless to add that this provision is almost unknown to English Criminal Law.

The learned author says (p. 5 n.): "J'ai consulté, sur les législations anglaise et allemande, *l'Esquisse du Droit criminel Anglais*,[2] de Kenny, traduit par Paulian, préface d'Émile Garçon, Paris, Giard, 1921; et le *Traité de Droit pénal Allemand* de Von Listz, traduit par Lobstein, préface d'Émile Garçon, Paris, Giard, 1911." He also refers to the work of M. Maurice Travers, "l'auteur du remarquable *Traité de Droit pénal international*," recently reviewed in the pages of this *Journal*. In addition to wide reading the learned author displays considerable acuteness, powers of criticism and breadth of view.

He hesitates to judge the merits of a Code of Criminal Law from the General Part of it only, without knowing the provisions of the Special Part, an attitude of mind which exhibits a wise caution and suspension of judgment. He points out that the two most remarkable and progressive modern codes, viz. the Norwegian and the Russian (of 1903), admit into their special parts certain matters which tend to the confusion of Law and Morality, and a conception of individual liberty incompatible with modern ideas; yet he cannot refrain from expressing a conviction that the special part of the Polish Code will conserve the same principles of liberty under the law as inspire its general part.

The chief problem of codification still is, how to preserve the elasticity (or *plasticité*, as M. Garraud calls it) of the unwritten or common law, and reconcile it with the rigidity of a written or printed code, particularly in reference to its definitions. In order to surmount this difficulty, he observes that the *projet Makowski* entrusts immense powers to the

[1] *Les Avant-Projets Polonais de 1922, sur la Partie Générale d'un Code Pénal: leur place dans le mouvement de réforme et de codification du droit pénal*, par Pierre Garraud, Professeur de Droit Criminel à la Faculté de Droit de Lyon, pp. 122, 1924. (Paris: Marcel Giard.)

[2] Professor C. S. Kenny's *Outlines of Criminal Law*, which was translated into French in 1921.

tribunals. M. Garraud thinks that such powers ought to be given to the judges, and says that they will be tempted to usurp them if they are refused; he asserts that the success of codification is bound up with the problem of the organization of the judiciary. Professional judges may, in his view, surmount the difficulty; but he has his doubts about those *tribunaux répressifs composés de citoyens*, which he quaintly refers to as *l'obstacle du jury* (p. 113).

G. G. A.

The English Statute-Book.—It is true, as Sir Mackenzie Chalmers observes in his useful article in *The Edinburgh Review* (April 1924), that we are all presumed to know every law from its date of operation. Most people have only vague notions of the laws affecting their daily life, and when necessity arises have to pay some one for his advice. The ordinary law-abiding citizen, however, has little need for more than a perfunctory acquaintance with the law: he learns the rudiments necessary for his own trade or industry, and for the rest lives honestly and pays his taxes and rates as demanded. Ignorance of the tangled statute-book rarely troubles him. The smoker cannot fill his pipe, as Sir M. Chalmers says, "until the provisions of 32 special Acts have been complied with." True, but with these the smoker has no concern; that is the importer's affair: he merely buys his tobacco and enjoys his pipe. The plurality of Acts on the same subject is, of course, due to frequent amendments, and the reason for its continuance is that the unconcerned smokers are counted by the million, while the importers are few. It is their business to be familiar with the various regulations of their trade. And these are the conditions of a great many articles of trade besides tobacco. As in these days not much useful legislation is obtained except under popular pressure, and that is only applied when dissatisfaction is widespread. Parliament goes on year by year adding to the existing tangle.

There is, however, an urgent need for the reform of the Statute-Book: its complex provisions foster much unnecessary litigation, occasion an enormous expenditure on legal advice, and thwart the researches of laymen, however intelligent. The problem is how to effect reform in spite of a supine electorate and their creature, the supine Legislature. Much has been done, as Sir M. Chalmers shows, by the Statute Law Committee, whose existence and functions are due, not to the Legislature, but to Lord Cairns and succeeding Lord Chancellors. The House of Commons is content with providing them with a modest subvention for their expenses. The principal operations of this unpaid body are the preparation of (1) Revision Bills (for clearing the Statute-Book of obsolete and virtually repealed enactments); (2) Consolidation Bills; also the publication (3) of an Index and Chronological Table of Statutes; and (4) revised editions of the Statutes. Thirty-four revision Acts have enormously reduced the bulk of the unrepealed law. On a very rough estimate, 80,000 pages have been brought down to 20,000. And yet there is, as

Sir M. Chalmers says, an immense amount of "dead and unnecessary matter." He contends for a new edition of the public Acts every ten years. To render this effective, the intervening years should be used for consolidating the groups of Acts dealing with matters of frequent legislation. No one is better entitled to press the claims of consolidation than the lawyer to whom we owe the Bills of Sale and Sale of Goods Acts.

A. G.

Gray's Inn Moot Book.—Fifty years ago the Masters of the Bench of Gray's Inn revived the practice of mooting, as formerly practised in the Inns of Court. Mr. Bruce Williamson, in his New History of The Temple, has given an admirable account of this ancient method of teaching law, which is of great value to the students in acquiring forensic ability, learning the rules of evidence and procedure and preparing themselves for their work as advocates. Lord Justice Atkin, as Master of the Moots at Gray's Inn, has edited a volume (published by order of the Masters of the Bench by Butterworth) containing a record of a selection of the moots since the foundation of the Gray's Inn Moot Society in 1875. The procedure follows closely that of the sixteenth century.

"The moots," writes the learned Editor, "are held after dinner during term. There are usually two a term, the evening chosen being a Monday. The Presiding Judge sets a question, which is printed and circulated, 'counsel' being selected by the committee from the students and junior barristers. If the Presiding Judge is a member of another Inn he dines with the Benchers in Hall. After dinner the Benchers and Judge retire for a time and return to Hall at 8.30. They sit at the high table. In the meantime one of the tables in Hall has been drawn across the Hall, and on the 'forme' at the table two counsel sit, a leader and junior on each side; the leaders no longer sit necessarily 'uttermost.' Necessary books are provided, if required, from the Inn Library. The practice is announced to be that of the Court of Appeal, by which the irreverent chiefly understand that counsel are subject to interruption from the Bench. It is recognized, however, that judicious interruption is essential to the value of the training. It keeps counsel to the point, and differentiates the proceedings from a debating society. Leader and junior having opened the case for the appellant, counsel for respondent state the opposing case, leading counsel for appellant replies, and the Judge delivers judgment. He is not bound even by a decision of the House of Lords. Thus the Presiding Judge has opportunities of expressing himself as to decisions in which as counsel or judge he had taken a different view, opportunities which have not been neglected. The proceedings close by a vote of thanks to the Presiding Judge, moved by the senior in Hall, and duly acknowledged."

In the course of fifty years many eminent representatives of the English bar have taken part in the proceedings. The subjects of the moots cover a wide range, but by a curious coincidence there is no case involving a medical point. In at least one large medical school, that of

King's College Hospital, there annually takes place in connexion with the Students Society a trial of an action analogous to a moot, over which a Bencher of Gray's Inn presided on the last occasion. It is the most popular meeting of the season. In view of the readiness of the Masters of the Bench to assist others by extending these opportunities it may well be that the time will come when schools of law and medicine will combine occasionally in this form of instruction, in which each might learn much from the other. In the meantime, this informing volume constitutes a suggestive guide to the teachers in law schools of other parts of the Empire, and may be found useful even in those of the universities of the United States, where the teaching of law is more fully organized than it is in the metropolis of the British Empire.

Maintenance Orders.—It is officially announced that Orders in Council have been issued extending the Maintenance Orders (Facilities for Enforcement) Act, 1920, to New South Wales, Papua and Jamaica. The Act provides for the enforcement in England and Ireland of maintenance Orders made by a Court in any part of His Majesty's Dominions outside the United Kingdom or in any British Protectorate to which it extends, and the Legislatures of the State of New South Wales, Papua Territory and the Colony of Jamaica have made reciprocal provision for the enforcement therein of maintenance Orders made by Courts in England and Ireland.

The operation of the above-mentioned Order in Council is confined to England and Northern Ireland, and similar provision has not yet been made as regards the Irish Free State by the Government of that State.

Reciprocal Enforcement of Judgments.—It is officially announced that, in view of the provisions of Part II of the Administration of Justice Act, 1920, which provides for the enforcement in England, Scotland or Ireland of judgments obtained in any parts of His Majesty's Dominions outside the United Kingdom or in any territories under His Majesty's protection to which the Act extends; the Legislatures of the undermentioned Overseas Territories have made reciprocal provision for the enforcement therein of judgments obtained in the High Court in England, the Court of Session in Scotland and the High Court in Ireland. Orders in Council have accordingly been issued extending Part II of the Act to: Ashanti, the Bahamas, Bermuda, Jamaica, Mauritius, the Federated Malay States, Johore and the Northern Territories of the Gold Coast.

The operation of the above-mentioned Orders in Council is confined to England, Scotland and Northern Ireland, and similar provision has not yet been made as regards the Irish Free State by the Government of that State.

NOTICES OF BOOKS.

THE FREEDOM OF THE SEAS.[1]

Mr. Pitman Potter has written an admirable little book fulfilling the promise of the title, and discussing from the historical, the legal and the political aspect the two subjects which have been grouped together under the common phrase of "Freedom of the Seas." The ideals advocated would have received the enthusiastic support of the late President Woodrow Wilson, and will be supported by many others who seek to raise the nations to a higher conception of their duty towards their neighbours. The aim is noble. It is discussed with learning and impartiality, and yet it leaves the practical man in doubt. It was probably inevitable that two distinct subjects should be treated as related; but antagonisms between relatives are not unknown, and when they occur a separation is desirable. It is therefore in no carping spirit, but as an introduction to Mr. Potter's valuable exposition, that our study of his book is prefaced by an attempt to disentangle two antagonistic questions and to consider them separately. For this separation is all-important. The world is ruled by words and phrases—many of them misleading—and few phrases have been coined or come into common circulation more misleading than the phrase "Freedom of the Seas."

It was originally used as descriptive of the controversy which might have been described as a dispute between the claim to sovereignty of a part or parts of the sea, and the claim to free passage or entry into all navigable waters, for purposes of commerce or travel, in time of peace.

But it has also been used as a title for a very different controversy: the use or disuse of the economic weapon as a means of coercing the will of an enemy in time of war.

The first of these two controversies did not begin with either Grotius or Selden, and has not ended with them. It was at the root of much of the controversy between Rome and Carthage, and it is active to-day in the disputes as to the limits of territorial waters, and the rights which may be exercised over vessels hovering in marginal waters which in strict law are beyond the limits of national jurisdiction. It is a controversy which in the past has made the Baltic and the Black Seas closed seas in the contention of the littoral States whose shores were washed by those seas, and it is a controversy which in its latest phase has been brought

[1] *The Freedom of the Seas, in History, Law and Politics.* By Pitman B. Potter. (London: Longmans, Green & Co. Pp. xvi + 299. 10*s.* 6*d.* net.)

into prominence by American spirit smugglers, and the Soviet claims to exclusive fishing rights in the neighbourhood of the White Sea. The second controversy relates to one of the three methods by which the will of an enemy may be coerced and subdued in time of war. These three methods are: the destruction of his armies and navies, the occupation of his territory and the coercion of the inhabitants, and thirdly the interruption of his commerce and his supplies.

Of these three methods of coercion the third is undoubtedly the most humane, and Mr. Dana wrote of it that it "takes no lives, sheds no blood, imperils no households, and deals only with the persons and property voluntarily embarked in the chances of war for the purposes of gain and with the protection of insurance" (*Hall*, part iii, c. iii.).

It is the British contention that the above definition of the right of maritime capture is correct, and that British sea-power represents a more humane employment of force than the massacre and devastation incidental to the operations of land armies.

The separation of two distinct subjects is certainly essential in any discussion of either of the two subjects mistakenly confused under the common title of "Freedom of the Seas," and the British position should be clearly defined. For, as Mr. Potter rightly says: "Once having agreed to a principle of free use the maritime State is precisely the state most interested in seeing that principle generally accepted by other States." Great Britain, having abandoned the claim to the sovereignty of the seas, becomes necessarily the chief advocate of the right of free navigation.

Similarly, the weaker naval Power must necessarily be the champion of the *Mare Clausum*, and Russia naturally supports the Turkish claim to close the Dardanelles.

Similarly, again, the maritime State, as Mr. Potter correctly points out, is opposed to privateering, the right of angary, conversion at sea, and other rights which may promise great help "to the lesser naval power in time of war" (p. 205). He might have added submarines. For submarines are the weapon of the weaker naval power, and Great Britain would gladly prohibit their use altogether if that were possible. But the controversies on these two questions have lasted for centuries in the past and may last for centuries to come. In each war or in each dispute they are settled by compromise. The Anglo-American Treaty is an attempt to compromise on the needs of the United States and the strictly legal rights of England in the marginal waters where "hovering" takes place, and in time of war the maritime State is compelled to limit the exercise of sea power in deference to the protestations of neutrals.

And this need for considering neutral claims and neutral rights has acted as a wholesome restraint on the misuse of sea power. It has in effect substituted pre-emption for confiscation, and has generally created a desire to avoid interference with neutral trade where that trade does not supply the enemy either directly or indirectly.

In an admirable chapter on "The Effect of the World War" Mr. Potter shows how efforts were made by the co-ordination of the decisions of Prize Courts, by Treaties such as the Declaration of Paris, The Hague Conventions and the Declaration of London, to codify the Laws of War at Sea, and how changing conditions rendered these unratified contracts obsolete.

> The law of 1914 was defective partly by neglect, but mainly because of the appearance of state control of industry and commerce, military conscription, and means of submarine and aerial navigation, which rendered the principles, the assumptions, and the distinctions on which the law of 1914 rested questionable, uncertain, and, in certain cases, positively contrary to fact (page 167).

Precisely so, for the change is not merely a change from Rousseau's definition of a war between governments and mercenary armies to conflicts between whole nations in arms, but the submarine cable, and the growth in the size of merchant vessels, have contributed their share to changes in the law. The boarding officer now knows almost all there is to know about a ship before he boards her, and he is no longer limited to evidence "out of her own mouth"; and the ship is so large that she cannot be searched at sea, and must be taken into port. Are these developments law? We think so. What do others say?

But, whilst fully accepting the change or rather development in the use of sea power as a means of coercion, we do not think with Mr. Potter that the permanent solution of the Freedom of the Seas lies in international organization in a League of Nations. No permanent solution is possible in the case of either of the two distinct questions which have been hitherto comprised in the phrase, "the Freedom of the Seas." It is probable, and indeed almost certain, that the development of the fishing industry, the expulsion of refuse oil, and the enactment of distinct social laws such as that represented by the 18th Amendment of the American Constitution will necessitate a new definition of the authority of States, not only in their territorial waters, but in the marginal waters—a very indeterminate expression. And it is certain that the submarine and the airship and the aeroplane will necessitate changes in the rules affecting the right of capture or destruction of commerce.

But these rules may in their turn be superseded by some new development or new invention. Finality is unobtainable. What is certain is that the Maritime Powers have on the whole used sea power humanely and that Dana's description of it is as true to-day as when it was written.

To weaken the two strongest Sea Powers, England and the United States, in deference to the claims of the Military Land Powers would not, so far as can be ascertained from the evidence of history, tend either to mitigate the horrors of war or to promote peace. Power must reside somewhere. It is to the interest of the world that it shall be exercised moderately and with justice. Would a change secure this end? We think not. Nevertheless, whilst it would be impossible for either England

or the United States to submit to the control of the Land Powers over the enactment or exercise of maritime law, it is highly desirable that the Land Powers shall have the right of appeal to the public opinion of the world, and there are ample facilities for making such an appeal now in existence. One of those facilities is by the channel of the League of Nations. But the League in that capacity would be merely a channel of publicity or of appeal. It could not claim to be a legislative body enacting laws, or a super-state imposing its will.

Nor could it be regarded as an efficient substitute for the check on the abuse of sea power, which now exists, in the need for conciliating neutral opinion.

This valuable study of a most important subject is gladly commended, though it has been necessary to differ from the conclusions reached by the writer.

GRAHAM BOWER.

THE LAW OF BANKS AND BANKING.[1]

MR. FALCONBRIDGE has conferred a notable benefit on Canadian lawyers and others by his exhaustive treatise on banking and negotiable instruments.

His treatise is divided into two Books. Book I deals with banking. After a careful review of Canadian banking legislation, Mr. Falconbridge sets out the provisions of the Act of 1923 which, in 166 sections, elaborately regulates the status of Canadian banks. Each section is carefully commented on, and English decisions, so far as relevant, are cited as well as the Canadian cases. In England the last bank (other than the Bank of England) having the right to issue bank-notes disappeared in 1921. In Canada, under safeguards, there are now 17 banks with the right to issue bank notes (p. 58).

Book II, which deals with negotiable instruments, is of more interest to English lawyers. The Canadian Bills of Exchange Act of 1890, though the arrangement has been altered, for the most part reproduces in identical terms the provisions of the English Act of 1882. The result is that Canadian decisions, though not binding on English Courts, may yet be usefully consulted as throwing light on the construction of the English Act. Mr. Falconbridge very conveniently adds to each section of the Canadian Act a reference to the corresponding section of the English Act, and of the United States Negotiable Instruments Law, which has now been enacted, with small variations, in 49 States and territories of the Union. In his Introduction to the Act the author sums up the main points in which the Canadian Act differs from the English law (p. 479). England is the only country which draws a distinction between statutory

[1] *The Law of Banks and Banking, Bills of Exchange, and other Negotiable Instruments (Canada).* By J. D Falconbridge, K.C., etc. (Toronto: Canada Law Book Co. $12 net.)

and common-law holidays in calculating the maturity of bills and notes. Canada, very sensibly, makes all instruments falling due on a non-business day payable on the succeeding business day. The delegates to The Hague Conference of 1912 recommended the abolition of this anomaly in English law, but no effect has been given to their recommendation. In Canada sight drafts are distinguished from demand drafts, and are entitled to days of grace. When the English Act was under review it would have been more consonant with modern views to have got rid of days of grace altogether. No good reason can be urged for giving a purely fictitious maturity to modern commercial instruments. If a bill is intended to be payable 33 days after date, why not say so, instead of making it payable 30 days after date with a tacit implication of three days' grace? Canada and the United States agree in rejecting the English provision which protects a banker who in good faith, and in the ordinary course of business, pays a cheque held under a forged endorsement. For the sake of bankers in these countries, let us hope that forgery is less common there than it is in this country. In England only foreign bills require protest in case of dishonour, but in Quebec all dishonoured bills must be protested, and, in the rest of Canada, may be protested. This rule is supplemented by a section which makes protest *prima facie* evidence " of presentation and dishonour and also of service of notice of presentation and dishonour " as stated in the protest. There are other minor divergencies from English law which are of interest to the student of comparative legislation. These divergencies are all carefully noted and commented on in Mr. Falconbridge's valuable work.

M. D. CHALMERS.

LIBEL AND SLANDER.[1]

" THE aim of this work," says Dr. Clement Gatley in the preface, " is to set forth in a concise form the leading principles of the law of libel and slander in a civil action at the present day."

" With this object in view," he proceeds, " all unnecessary reference to historical matter has been omitted." In one sense it is a pity that it should be so. The history of a legal rule is often more interesting than the actual rule. And this is assuredly true of the body of rules that make up the modern English law of Libel and Slander.

There is an engaging quality of justice in the rules that are found in some of the older sources of the law. Thus, it is said that in the early Icelandic code, the man accused of cowardice had the right of slaying his accuser. And more than a thousand years ago the dooms of Alfred provided that the slanderer should have his tongue cut out unless he could redeem it with the price of his head. Again, by the terms of the Norman Costumal he who falsely calls another " thief " or " manslayer "

[1] *The Law and Practice of Libel and Slander in a Civil Action*, by Clement Gatley, LL.D., B.C.L. London: Sweet & Maxwell, Ltd., pp. cxxii + 932. Price £2 10s. net.

must pay damages and, holding his nose with his fingers, must publicly confess himself a liar.

The appropriateness of the penalties inflicted in these cases would surely have gladdened the heart of Jeremy Bentham, who, as is well known, anticipated Gilbert and Sullivan in the desire to make the punishment always fit the crime. Thus, for an insult offered by a man to a woman, Bentham would have it that the man should be dressed in woman's clothes and that the retort should be inflicted by the hand of a woman.

More rude and rough is the rule of the Salic law which provides that if one calls a woman "harlot," and fails to prove the truth of the charge, one must pay her forty-five shillings. So also in the local Courts in mediæval England the second volume of Pollock and Maitland delicately points out that the English for *meretrix* was actionable, though an interchange of this against the English for *latro* left one shilling due to the man. One is tempted to state the proposition in the form of an equation in algebra: Latro = Meretrix *minus* One Shilling. Or ought one to put it the other way round: Latro *minus* One Shilling = Meretrix?

It is only by reference to the history of the law of Libel and Slander that one is at all able to understand or to explain how it comes about that (in the language of a modern writer) "Reputation is worse protected with us than perhaps with any civilized nation in the world." "The English law of Defamation," says Dr. Van Vechten Veeder, "is not the deliberate product of any period. It is a mass which has grown by aggregation, with very little intervention from legislation, and special and peculiar circumstances have from time to time shaped its varying course. The result is that perhaps no other branch of the law is as open to criticism, for its doubts and difficulties, its meaningless and grotesque anomalies. It is, as a whole, absurd in theory and very often mischievous in its practical operation."

With the exactitude of a true scientist, Dr. Gatley sets forth in the volume which is before us the leading principles of the law of Libel and Slander in a civil action.

The advertisement informs us that the author "has endeavoured to incorporate in the body of the work every decision of importance down to the date of publication. He has systematically gone through the provincial law reports of Canada and Australia and the New Zealand Law Reports, and has incorporated a number of the more important decisions, several of which cover points of law on which there is no direct English authority. He has also carefully gone through the cases collected in the American Century and Decennial Digests and has incorporated among others a large number of the most important, several of which illustrate novel or doubtful points of law."

A careful perusal of the book leaves one with the strong conviction that here is a leading instance of Truth in Advertisement.

The incorporation of the American and Colonial decisions renders the

book invaluable alike to the busy practitioner and to the serious student of Comparative Jurisprudence. Through its use by the one and the other the work is certain in the course of time to exercise a real and formative influence on the law.

And yet there are one or more topics with which (even though they be of purely English interest) one could have wished Dr. Gatley to deal in a somewhat less summary fashion. There is the topic of Trade Unions. These vast associations of capital and labour (as Lord Justice Atkin has shrewdly styled Trade Unions) are, of course, immune from civil liability for tortious acts. And Dr. Gatley therefore very rightly says that "no action will lie against a trade union for a libel published by or on behalf of the union, whether it was published in furtherance of a trade dispute or not." But is he equally right in stating *simpliciter* that "a trade union, if registered, can sue in its registered name for any defamatory words which are calculated to injure its corporate reputation"? The proposition as Dr. Gatley states it is certainly not supported in its fulness by the *Taff Vale* case, which he cites as the sole authority. Am I liable in damages in an action of libel for the mere publication of a written statement whose tendency is to diminish the esteem in which a particular trade union is held? *A Dieu ne plaise.* We venture to suggest that the rule of law in reference to trade unions is the same as the rule in reference to corporations, and that the common rule is rightly stated by the late Sir John Salmond in the following terms: "A statement is defamatory of a corporation (trade union) and is actionable as such at the suit of the corporation (union) if both of the two following conditions exist, but not otherwise: (*a*) The statement must be of such a nature that it would have been defamatory had it been directed against an individual; (*b*) it must also be of such a nature that its tendency is to cause actual damage to the corporation (union) in respect of its property or business."

After Trade Unions, the Press. Dr. Gatley accurately states the existing rule of practice that in an action of libel against the proprietor of a newspaper, if publication is admitted, interrogatories will not be allowed as to the name of the author of the alleged libel or as to the name of the person who supplied the information on which it was founded. The judgment delivered by Lord Justice Scrutton in the *Lyle Samuel* case has plainly showed that there is no rational basis to the rule. A writer of Dr. Gatley's learning and discernment might readily have shown that the rule is against reason and in many instances operates in denial of justice. For the author of a libel is a joint tortfeasor with the proprietor of the newspaper which publishes the libel. And the malice of one joint-tortfeasor infects all his fellows. In an action therefore in which malice is an issue and in which proof of it would destroy the defence, the ascertainment of the identity of the author of the libel may (if he be a person who is known or can be proved to entertain ill-will or malice towards the plaintiff) be the decisive factor in the case.

And the present rule of practice does not allow his identity to be ascertained by the only means that may be available.

But this is hypercriticism. One cannot fairly ask more from a text-writer than that he should give to the profession a lucid and accurate statement of the law. And assuredly Dr. Gatley has done so in this attractive and admirable volume.

RICHARD O'SULLIVAN.

THE ELEMENTS OF JURISPRUDENCE.[1]

SIR THOMAS HOLLAND began his career as a legal author with an Essay on Composition Deeds in 1864, and the thirteenth edition of his greatest work, first published in 1880, is now revised by him unaided in 1924. To review such an acknowledged classic would possibly be impertinent, and certainly superfluous. In spite of extensive revision in detail, the main framework and all the leading ideas of the book have remained the same from the first edition to the latest. Some of them, at least, will be less favourably received in 1924 than they were in 1880. The theory of sovereignty, and of law as the creature of political sovereignty, is now being assailed from many sides, but it is fair to add that the value of the greater part of the book does not depend at all upon the acceptance of this theory. It has always seemed to the present writer that some of the new terms introduced by Sir Thomas are of the happiest description. "Remedial rights," "person of incidence," "person of inherence," and so forth deserve to become part of the ordinary language of juristic thought.

One notices some rather curious omissions of references to modern works in the foot-notes. It would have been expected that Maitland's Essays would have been referred to under Trusts and Phillipson's large work on ancient International Law under that heading.

H. J. R.

THE PEACE CONFERENCE OF PARIS.[2]

THE sixth and concluding volume of this massive and highly valuable *History of the Peace Conference of Paris* treats of the various aspects of the Treaties in Northern and Eastern Europe and outside Europe, and further it presents conclusions on the work of the Conference as a whole and on the prospects of a genuine Society of Nations. We welcome, as in the case of the earlier volumes, the insertion of important documents as Appendixes, *e.g.* the secret Allied Agreements and other instruments affecting the future of the Turkish Empire, the Upper Silesian award,

[1] *The Elements of Jurisprudence.* By Sir Thomas Erskine Holland, K.C. Thirteenth edition. 1924. (Oxford: at the Clarendon Press. 14*s.* net.)

[2] *A History of the Peace Conference of Paris.* Edited by H. W. V. Temperley. Published under the auspices of the British Institute of International Affairs. Vol. vi, 1924. Pp. xxxi + 709. (London: Henry Frowde and Hodder & Stoughton. 42*s.* net.)

the Secret Allied Agreements with reference to China and Japan, and (for the first time in Britain) the text of the American Treaty with Germany. We congratulate the editor and the several contributors on the completion of an arduous undertaking, one that has been difficult to plan and in parts dangerous to touch.

It is perhaps permissible, and in the *Journal* it is especially pertinent, to draw attention to the high merit of three of the more general contributions, namely, a section of about thirty pages, from the pen of an unquestionable authority, on the revised status of the British Dominions, a section on the making of the Covenant by Mr. J. R. M. Butler, and a section on the Permanent Court of International Justice by Mr. P. J. Baker. The editor, in addition to other matter, submits "Conclusions." They are few; and one cannot suppress the feeling that the true conclusions have come in at least two of the three sections to which reference has just been made. The editor's own concluding note is appropriate to the spirit which, in so far as there is a dominant one, has pervaded this work: it is a note of tribute to President Wilson and of idealism for the League, the Covenant being, in the words of General Smuts, "Wilson's souvenir to the world."

While duly commending the editor's reticence in fields which he has assigned to others, one would have welcomed a few more of the gleanings that come from the harvest he has supervised; and there are other omissions. We need a definite examination of the question, how far the principle of the equality of States (partly touched in the second volume) is imperilled, and how the fundamental of the State as a right-and-duty-bearing unit is affected. Secondly, there should have been a reasoned comparative statement of the public mind in leading nations on the League—an inquiry and an estimate that we should ever have before us. Thirdly, there might have been a considerable and dispassionate statement on the more important contributions to a record of the Peace Conference that have appeared in other countries.

But we look ahead. A supplementary volume—or more than one—will be called for in a very few years; and the preparations should not be suspended. What we have had presented to us is a record and appreciation of the Peace Conference; and it is welcomed. The place of the Conference cannot yet be determined. Its History will be written later.

D. P. H.

THE UNIFICATION OF SOUTH AFRICA.[1]

THE Rhodes Professor of Imperial History in the University of London has compiled a work containing documentary evidence of the process by which South Africa achieved its measure of union. When the materials

[1] *Select Documents relating to the Unification of South Africa.* Edited, with an Introduction, by Arthur Percival Newton, M.A., D.Lit., B.Sc., F.S.A., Rhodes Professor of Imperial History in the University of London. Two Volumes. Pp. xxvii + 281 and viii + 291. (London: Longmans, Green & Co. 1924. 25*s.* net.)

here supplied are taken in relation to a volume, *Federal and Unified Constitutions*, and to Mr. Newton's well-informed introduction to this volume, published in 1923, they provide an illuminating and indispensable ground-work towards understanding how South Africa got her constitution, and why that constitution is a unified, not a federal, constitution.

The arrangement of the material Mr. Newton has wisely made chronological—from the correspondence of Sir George Grey in 1858–9, thereafter from 1871, without any pronounced gap, to the cardinal and invaluable Selborne Memorandum of January 1907, and to the debates in the House of Commons on the second reading of the South Africa Bill in August, 1909. The whole of the second volume is devoted to material between 1905 and 1909.

Mr. Newton's chief difficulty has been that of selection from the wealth of material calling for recognition; and, with economic considerations, including the railway problem, weighty, with the "native" question paramount, and the question of Briton and not-Briton persistent, there was certainly need for a wide interpretation of the historico-political process which the official documents and supplementary material are intended to illustrate. Professor Newton has emphasized the official in his selection, but it is the official in no narrow sense of the word. His Introduction—thirteen pages—might with advantage have been more substantial. The standard in this matter was set long ago, and was set high, by Stubbs in his *Select Charters*—a repertory of *Origines*, he termed the work. That volume, published in 1870, in itself and through its direct issue has for fifty years been the most influential of all works in Britain towards the critical study and teaching of history. Volumes of "Sources" are now many; true disciples of Stubbs among their compilers and editors are still few. We should have welcomed a compact presentation of the historical setting necessary for the understanding of the documents, as well as more editorial notes. Mr. Newton rightly insists, however, upon the necessity of the student reading widely and circumspectly the history of South Africa and of the British Empire; and most will agree with him when he implies that many writers on political science are too apt to deal in generalities and philosophies, without the controlling hand of the concrete and a command of political situations. Pre-eminently for the interpretation of the politics of the Anglo-Saxon world, there is need of such protest against a vague and spacious political philosophy. Where there has been a training through a study of history, and not modern history only, through the study of constitutional law, and of the history of political thought, a collection of documents like the present may with safety be placed in the hands of a student. Where there has not been such training, they have little educational value, and may lead to facile conclusions regarding political terms and constitutional instruments. Even the "metaphor in the Tower" has its pitfalls for the uninstructed and the unwary.

D. P. HEATLEY.

We have to acknowledge:

The Monroe Doctrine. By Alejandro Alvarez; Carnegie Endowment for International Peace. (New York: Oxford University Press, American Branch.) Pp. ix + 573. $3.00.

German White Book: Responsibility of the Authors of the War. Carnegie Endowment for International Peace. (New York: Oxford University Press, American Branch.) Pp. xv + 178. Price $2.00.

Prisoners of War. By Herbert C. Fooks. (Maryland: The J. W. Stowell Printing Co.) Pp. xxiv + 456.

Tudor Economic Documents. Vol. i, "Agriculture and Industry," pp. xiii + 383; Vol. ii, "Commerce, Finance and the Poor Law," pp. ix + 369. Edited by R. H. Tawney and E. Power. (London: Longmans, Green & Co.) Price 15*s.* net each.

Les Morts Malfaisants: "Larvæ, Lemures," d'après le droit et les croyances populaires des Romains. By Emile Jobbé Duval. (Paris: Recueil Sirey.) Pp. 1–334. Price frs. 25.

Le obbligazioni nel diritto inglese in rapporto al diritto italiano. By Professor Mario Sarfatti. (Milan: Dottor Francesco Vallardi.) Pp. xii + 352.

La Conscription des Neutres dans les Luttes de la Concurrence économique. By Mohamed Abdullah El-Araby. (Paris: Marcel Giard.) Pp. xxx + 328.

La Procédure de Compensation. By Dr. Arthur Nussbaum. (Tubingue: J. C. B. Mohr (Paul Siebeck).) Pp. 48.

Le Droit Privé. By Georges Cornil. (Paris: Marcel Giard.) Pp. xvi + 147.

Hague Rules Explained, being the Carriage of Goods by Sea Act, 1924. By Sanford D. Cole. (London: Effingham Wilson.) Pp. xii + 140.

The Stockholm Conference on General Average and the York-Antwerp Rules, 1924. By Sanford D. Cole. (London: Effingham Wilson.) Pp. vi + 73. Price 2*s.* 6*d.*

The Law as to C.I.F. Contracts. By H. Goitein. (London: Effingham Wilson.) Price 4*s.* net.

The English and Empire Digest. Vols. ix and x, "Companies"; Vols. xiv and xv, "Criminal Law and Procedure." (London: Butterworth & Co.)

The following periodicals are also received: American Bar Association Journal; American Economic Review; American Journal of International Law; American Political Science Review; Aperçu Statistique du Commerce Extérieur de la République Tchécoslovaque; Bolletino della Emigrazione; Bombay Law Reporter; British Year Book of International Law; Bulletin de la Société italienne pour les Études de Droit industriel; Bulletin de l'Institut Intermédiaire international; Bulletin mensuel de la Société de Législation comparée; Bulletin officiel du Congo Belge; Bulletin statistique de la République Tchéco-

slovaque ; Calcutta Weekly Notes ; Canadian Bar Review ; Columbia Law Review ; Edinburgh Review ; L'Égypte Contemporaine ; Headway ; Hindustan Review ; Instituto Ibero-Americano de Derecho Comparado publications ; International Labour Office Bulletin ; International Review of Agricultural Economics ; International Year Book of Agricultural Legislation ; Journal du Droit International ; Journal of the Parliaments of the Empire ; Juridical Review ; Kathiawar Law Reports ; Law Quarterly Review ; League of Nations Journal ; Madras Law Journal ; National Municipal Review ; Revista de Ciencia Juridicas y Sociales ; Revista de Derecho y Jurisprudencia ; Revue de Droit International et de Législation comparée ; Revue International de la Croix Rouge ; Social Sciences Quarterly ; South African Law Journal ; Studi di Diritto Industriale ; University of Illinois Studies in the Social Sciences ; Wisconsin Law Review.